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THE PROSECUTION OF DEMONSTRATORS OUTSIDE THE SOVIET EMBASSY

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

CITIZENS EXERCISING THEIR CONSTITUTIONALLY PROTECTED RIGHTS, PROTESTING THE BRUTAL TREATING OF HUMAN BEINGS IN FAR-AWAY LANDS

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THE PROSECUTION OF DEMONSTRATORS OUTSIDE THE SOVIET EMBASSY

THURSDAY, MAY 15, 1986

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:17 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Present: Senators Specter and Heflin.

Staff present: Alice Milder, chief counsel.

OPENING STATEMENT OF CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I thank all of you for attending and for your kind consideration of this issue. This is a hearing before the Subcommittee on Administrative Practice of the full Committee on the Judiciary of the U.S. Senate.

Recently, this city, which is the capital of the free world, has been the location of a miniature drama, which has unfolded on two different streets in Northwest Washington. The settings have been Massachusetts Avenue and 16th Street, and that latter is now known as Sakharov Plaza.

In each case citizens, in the exercise of their constitutionally protected rights, protest the brutal treating of human beings in faraway lands. They do so in a very honest, a very open fashion, and they do it with all the courage of their conviction. They do so, I observe, in the most exalted tradition of our Nation's great history. In one setting, those who exercise these rights by protesting before the South African Embassy are ordered by authorities to disperse, and if they fail to do so, they are arrested.

However, at that point, that is where these protesters' contact with our legal system ends. Now, in the other setting—and that is before the Soviet Embassy—things are not quite so simple. While the protesters' message is very much the same and is presented in a very similar manner, the treatment they receive from authorities is very different.

These activists, following their arrest, face an ordeal of prosecution, trial, conviction, then sentencing and fines, and in some instances even prison. This afternoon at this hearing this subcommittee will examine how this drama has unfolded the way it has and

why. We will ask the players in this drama about their roles, and ultimately, I hope, we will demand an explanation and an accounting for this disparate treatment.

A building located not too far from here bears a cogent inscription for today's hearing, and those words over the Supreme Court read "Equal Justice Under Law." Hopefully, those words are more than just a slogan. It is against this principle that we will assess the Government's conduct in this affair that I've just described.

We have assembled a complement of excellent witnesses to help us make such a judgment. Our first panel will set the stage for our story. They are those people who are called Soviet Jewry or human rights activists and who have deep personal convictions which have led them to experience, first hand, our Federal court system. They will explain what circumstances compelled them to make their decision and, of course, we all anxiously await hearing from them on that. But before I introduce the first panel—and the first panel I see is at the table and very correctly so—I would like to make a brief observation. It is ironic indeed that this hearing should take place during this week of Natan Shcharansky's visit to our country. Two days ago when Natan was received by the Congress in the Capitol rotunda, a very moving experience for all of us, he reminded us of the impact of public protest and what that impact is on those within the walls of the Soviet gulag. He told us stories of how, when by some slim chance—and it does not happen very often—reports of such protests reach the prisoners' ears. These prisoners' burdens, according to Shcharansky seem lighter and their hopes become much brighter.

Now, it is incumbent upon us to remember whose purpose we serve when we, the beacon of freedom in this world chill these types of public protest that are so encouraging to the imprisoned around the world. I do not believe it is in the best interest of our great Nation to chill those messages.

As a matter of procedure—and now we are ready to get down to business with the witnesses—let me remind all the people who are speaking here today that your written statements will be entered in the record in their entirety. I would ask each person to keep his oral statement to 7 or 8 minutes. When this little red light comes on, that is 8 minutes and I am going to ask you to finish your sentence or thought.

The first panel is made up of Rabbi David Oler, a rabbi of the Gaithersburg Hebrew congregation; in addition he also serves as secretary of the Washington Board of Rabbis as well as chairman of its Soviet Jewry Committee. Then we have a friend of mine, a very close friend of mine, June Daniels from Des Moines, IA. She is very active in this area, and she is a housewife and a mother of five and a humanitarian in the greatest sense of the word being very much involved in helping people leave the Soviet Union. She happens to have been arrested for protesting outside the Soviet Embassy in October 1985. Then we have Mark Epstein. He is executive director of the Union of Councils for Soviet Jews, and I have had a great deal to do with you, too, Mr. Epstein. I appreciate your coming. I would like to note that the union is the fifth largest grass roots Jewish organization in America. Then Henry Siegman, executive director of the American Jewish Congress, who was involved in

the organization of the first mass demonstration on behalf of Soviet Jewry; we thank you for your pioneering in that area. Mr. Siegman has been arrested for demonstrating outside both the Soviet Embassy and the South African Embassy. Then we have Dina Kaminskaya, who spent 37 years as a Soviet attorney before she was asked to leave the Soviet Union for serving as an unofficial legal counsel for dissidents and refuseniks.

I welcome all of you and thank you for your interest and participation today. More importantly, I thank you for your dedication and determination in increasing the public's awareness of this very important issue before us. You have a tremendous impact upon American public opinion, but even more so, I think, a tremendous impact upon world public opinion and, indirectly, Soviet policy. I would like to have you go in the order in which I introduced you, please. Go ahead, Rabbi.

STATEMENT OF A PANEL CONSISTING OF RABBI DAVID OLER, GAITHERSBURG HEBREW CONGREGATION, WASHINGTON BOARD OF RABBIS; JUNE DANIELS, DES MOINES, IA; MARK EPSTEIN, EXECUTIVE DIRECTOR, UNION OF COUNCILS FOR SOVIET JEWS; HENRY SIEGMAN, EXECUTIVE DIRECTOR, AMERICAN JEWISH CONFERENCE; AND DINA KAMINSKAYA, FALLS CHURCH, VA

Rabbi OLER. Thank you. Mr. Chairman, members of the committee, we appreciate very much your interest in our case and hopefully your willingness to consider amending the 500-foot law and exonerating those of us who have been unjustly found guilty of violating that law. Since May 1, 1985, just over 1 year ago, over 150 individuals, many of them rabbis, have been arrested while demonstrating within 500 feet of the Soviet Embassy in Washington.

The eight protests were conducted in an effort to prevent the ongoing cultural genocide against the Jews of the Soviet Union who are prohibited from practicing their religion as well as from emigrating from that land. The Soviet Union arrests and sends to labor camps the Hebrew and religious teachers whose only crime is trying to maintain a vestige of Jewish identity among the 2.5-million Jews forced to remain in the Soviet Union.

While protesters at other embassies were not prosecuted, the U.S. attorney chose to prosecute us, a clear instance of selective prosecution. A primary principle of the American tradition of democracy inspired by the Bible has thus been violated: "Proclaim liberty throughout the land to all the inhabitants thereof."—Leviticus XXV. Prof. John Rawls of Harvard in his book, "A Theory of Justice," has defined justice as fairness. We ask only whether the Government has been fair to us.

Foreign government should not be dictating whom to prosecute in our country. Selective prosecution was particularly distressing to the American Jewish community. At the very least it gives the impression of prejudice.

Bishop Desmond Tutu has said "human beings are made for freedom." Those who protest apartheid, the persecution of Soviet Jewry, and other human rights violations all share a common moral imperative.

The 500-foot law curtails freedom of speech. This law was enacted in 1938 and served to insulate the Embassy of Nazi Germany from such protests. We feel these protests should be viewed as a necessity under the common law. It is a necessity to ameliorate the suffering of others. It is the role of religious leaders to model such caring. Dr. Martin Luther King, a blessed memory, taught that "he who does not stand against evil becomes an accomplice to it." The Bible instructs us "do not stand idly by while another's blood is being spilled."—Leviticus XIX. In Judaism it is our religious obligation to bear witness to save others from unjust harm. According to both Jewish law and U.S. common law, an action is not considered a crime if it is in the service of preventing a greater harm which is imminent.

In terms of the imminence of the harm to Soviet Jews, before our gathering outside the Soviet Embassy, we became aware of the blinding in a Soviet prison of Yosef Berenstein and the beating of Yuli Edelstein and the suffering of other Hebrew teachers who were continually being imprisoned on trumped-up charges.

We were confronted by the plight of specific individuals threatened by continuing identifiable harm. We chose to act under the religious responsibility and moral obligation to redeem captives.

The D.C. Superior Court put the letter of the law above intent and moral imperative, refusing to hear the necessity defense and rejecting motions to dismiss based on selective prosecution and questions of constitutionality. We had no option but to reject an unjustly imposed sentence, and as a matter of conscience five of us went to jail at a Federal correctional institution to serve a 15-day sentence.

Our actions raised consciousness regarding the plight of Soviet Jews and galvanized support for them in our country, the events being reported on major news networks. Existing activities that had been largely ineffective in recent years and which had had little press were thus bolstered. In the Soviet Union the victims became aware of our efforts on their behalf through the Voice of America, and Mrs. Shcharansky communicated to me last June that the activists in the Soviet Union were encouraged by our efforts.

We sought to expose the behavior of the Soviet Union before their very door. Our crime was to read from the Torah scroll of the responsibility to love God and to fulfill divinely inspired values.

During World War II our country became aware of the annihilation of European Jewry, yet our Government refused to bomb the tracks to Auschwitz. Humanitarians at that time should have conducted acts of civil disobedience to influence official policies. The victims suffered greatly from the silence of the world. We cannot and will not remain silent while the Kremlin continues a final solution for Soviet Jews.

They have learned of our willingness to stand by them. We pray that this gives them hope and strength to persevere. The Russians are conducting an assault on Judaism and its teachings, which being based on love and compassion for all human beings, is the bedrock of Western civilization.

Yet there are those who want trade and cultural exchange with the Soviets regardless of human rights violations. Our Nation must

not be intimidated in the pursuit of human rights. The time has come to forthrightly articulate the issue in these spiritual rather than political terms, for we Americans need to free not only the obviously oppressed but ourselves as well.

We ask that you do whatever is in your power to exonerate those who have been found guilty and to stop further prosecutions of this type by amending the law. Thereby there will go forth a significant message of American support for victims of human rights violations throughout the world as opposed to a message of support for the perpetrators of evil. Thank you.

SENATOR GRASSLEY. Thank you, Rabbi Oler. Before you start, Mrs. Daniels, I would like to introduce a member of the subcommittee who is very active in the work of this subcommittee and ask if Senator Specter from Pennsylvania has an opening statement or anything he would want to say at this point.

OPENING STATEMENT OF ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman, just a word or two. I regret that I cannot stay because the Appropriations Committee is marking up an urgent supplemental at this moment, and I have to go there. But I want to commend you, Mr. Chairman, for convening this important hearing. In my capacity as chairman of the District of Columbia Subcommittee, we had hearings on the issue of the same statutory provision related to demonstrations in front of the South African Embassy. I think these hearings are particularly timely with Mr. Shcharansky's presence in Washington, DC. And it is very important that there be a method for very, very active protest of what goes on in the Soviet Union concerning Soviet Jewry.

I feel particularly keenly about that subject because, as I have said publicly before, my parents were both from Russia. It was not the Soviet Union then. But for the circumstances, I might be a refusenik myself at the present time. I visited refuseniks in Moscow and Leningrad in 1982, and although I think that progress is being made, a lot more has to be done and protests and public attention are very, very important vehicles. And, Mr. Chairman, these hearings lend to that. So I commend you and just regret that I cannot stay. But I will be reviewing the transcript. Thank you very much.

Senator GRASSLEY. Thank you, Senator Specter.

Mrs. Daniels.

Mrs. DANIELS. Mr. Chairman and members of the subcommittee, thank you for the opportunity to address you this afternoon concerning an issue of both gravity and urgency.

The need to act nonviolently beyond the letter of the law on behalf of an issue of basic human rights is embedded in our American tradition of civil disobedience. From Henry David Thoreau to Martin Luther King advocates of freedom and liberty have felt compelled to perform an infraction of the law in order to effect a greater good. It is within this spirit that I ask you to consider my reasons for demonstrating within the 500-foot radius of the Soviet Embassy that is the minimum legally specified distance.

As a mother of five children living in Des Moines, IA, I chose to fly to Washington at my own expense to protest the Soviet posture

on human rights because I felt so deeply the responsibility to draw increased public attention to the Soviet abuses of human rights. As a grandchild of emigres, I was always made aware of the freedoms we enjoyed as Americans, and I became equally aware that these liberties must never be taken for granted.

As a child born during the Holocaust, I appreciated how fortunate I was that my grandparents left Europe and that I had been spared the horrors of the Third Reich. However, the awareness of the fate of their sisters, brothers, and therefore my cousins, who remained behind only to perish, sustained my conscience. The events leading to the eventual slaughter of millions were allowed to proceed unchecked because few voices of protest were heard. As Elie Wiesel has said, "Let us remember: what hurts us the most is not the cruelty of the oppressor, but the silence of the bystander."

The parallels between the early stages of the Holocaust and the present-day situation for Jews in the Soviet Union are striking. The Nazis did not begin by sending millions to the gas chambers. The process began by the isolation of the Jewish community; the denial of university admission to Jews, and the anti-Semitic literature in newspapers, periodicals, and books all link the present Soviet approach to the chain of events used in Germany of the 1930's.

Virulent anti-Semitic cartoons have appeared in Soviet publications, and I have included some of those with my statement. The content is so obnoxious that they cannot be differentiated from those contained in Der Sturmer.

It must be emphasized that the anti-Semitism found in the Soviet Union today is both government sponsored and systematic. It nourishes the historical anti-Semitism which permeates Russian and Eastern European history and which fueled the pogroms my ancestors sought to escape. Present-day Soviet Jews cannot escape. We have only to look at the analogy of the Third Reich to illustrate this point.

The "White Book" drawn up by the Association of Soviet Lawyers and first published in 1979 is a scathing attack on Jews and is sanctioned by this official organization in the Soviet Union. Its second edition in 1985 was produced jointly by the Association of Soviet Lawyers and the Anti-Zionist Committee of the Soviet peoples. There is ample evidence which attests to the government sponsorship of anti-Semitism through a variety of media including the infamous film "Traders of Souls."

Because of scenarios mentioned above, the decision to be always vigilant became a necessity. However, it was a very difficult decision to break the law with prior knowledge. This was a soul-searching process and a decision entered into after painstaking consideration.

Even after many years of continued hard work on behalf of human rights in the Soviet Union, it is becoming increasingly necessary to bring these Soviet human rights abuses under public scrutiny. Exposure in this country can further reveal the conditions which are deteriorating weekly under Soviet oppression.

If we do not protect the liberties of others, we endanger our own freedoms as well. The danger of the loss of human rights cannot

and does not stop at our own borders. As Chernobyl has shown us, one nation's loss is a loss to us all.

As our great sage Hillel has said, "If I am not for myself, who will be? If I am only for myself, what am I? If not now, when?" Thank you.

Senator GRASSLEY. Thank you, Mrs. Daniels.

Mr. Epstein.

Mr. EPSTEIN. Thank you, Mr. Chairman. Since you have enjoined the witnesses from thanking you for arranging these hearings, let me at least take a moment to acknowledge your distinguished role as a leader on issues of human rights generally, Soviet Jews among them, not only on behalf of constituents and friends like Mrs. Daniels and organizations like our own, but also your distinguished role among your colleagues in the Chamber and internationally.

Senator GRASSLEY. Thank you very much.

Mr. EPSTEIN. My role here in presenting testimony is in part, I believe, because the Washington Board of Rabbis, before entering upon the course of action which they chose, consulted me and asked my opinion about the notion of civil disobedience at the Soviet Embassy as a means of publicizing the plight of Soviet Jews.

I replied to them that I could and would say nothing about the desirability of such a course of action; it was not my place to counsel for or against civil disobedience, but that I would answer one question which I knew to be of concern to them: whether or not such an action could conceivably help Soviet Jews and whether there was any danger that it could, in any way, possibly harm their cause.

And I replied that I felt there was no possibility that harm could come to them and some possibility that there might even be a positive effect. And so it is in that context that I framed my testimony, Mr. Chairman.

One of the lessons which Anatoly Shcharansky has been imparting to all of us in the last few days, as the chairman acknowledged, is the need for public action in addition to quiet diplomacy. Indeed, that has always been the philosophy of the Union of Councils for Soviet Jews, a grassroots organization with an actively involved lay leadership and membership. We are being reminded, I believe, of what those of us who observe the Soviet Union on a daily basis understand all too well: that the Soviet Union is insecure regarding its place in the world and its status as a superpower, extremely sensitive to what it feels to be a tradition of slights at the hands of the West, and is prone to vociferous and aggressive behavior as a means of making its views known and having an impact on other nations.

In the case of Soviet Jews, Soviet authorities have employed physical attack, incarceration, vilification in the press, and other techniques to discredit them. They have gone so far as to establish special organs of state, such as the Anti-Zionist Committee of the Soviet Public which Mrs. Daniels made reference to, which is the handmaiden of the Association of Soviet Lawyers with whom our own American Bar Association has recently signed an agreement of cooperation.

The Soviet Government exploits its broadcast media and its print media, which are under the total control of the state, and they fre-

quently respond with violent language to the interest and the activities of American administrations, the Congress, and American citizens generally, with respect to Soviet Jews.

There is no doubt that the Soviets are stung by such criticism and that they are concerned about their image throughout the world, including in the West. In addition, we know that the standard diplomatic channels of the Soviet Government do not necessarily report in full activities in the United States and elsewhere regarding Soviet Jews. We know that the question of policy toward Jews is not within the purview of the Foreign Ministry, but rather is a matter decided directly by the Politburo and under the administrative control of the KGB, the nefarious Soviet security services concerned with both internal and external affairs. This analysis is confirmed by the memoir of Arkady Schevchenko who deals with this explicitly.

Another fact which must be considered in choosing tactics and strategies for influencing Soviet policy toward Jews is to reflect on past experience. We have no doubt that public pressure, publicizing specific, individual cases has produced results even in periods when the level of emigration has been painfully low.

Furthermore, we know that one of the most effective ways of influencing behavior within the Soviet Union, of making the Soviet authorities aware of our interest in Soviet Jews generally, and in individual cases particularly, and of making sure the Soviets understand how informed and knowledgeable we are regarding the conditions of individual prisoners of conscience and others, is by orchestrating events which are so significant and extraordinary as to be reported in the press and monitored by Soviet authorities, either from the print press, broadcasts, or the intelligence system.

It was with this knowledge in mind, I believe, that the various groups of rabbis and others chose to demonstrate in front of the Soviet Embassy. By doing so, they certainly created interest among the media, but that was at best a secondary benefit. By choosing the Embassy itself, the available outpost of the Soviet Government here, and creating sufficient publicity as to require a diplomatic response, they assured that it would be impossible for Soviet Embassy personnel to suppress knowledge of these embarrassing incidents here and force them to be reported to Moscow.

In addition, the accounts of the demonstrations and trial which were broadcast into the U.S.S.R. by radio assured not only that the interested community within the U.S.S.R. would be aware of these events, but that Soviet monitors would transcribe them and report them in their analysis of American broadcasting into the Soviet Union.

Mr. Chairman, I will not try your patience by taking time to discuss individual cases. Rabbi Oler made some reference to those cases which were in the consciousness of the demonstrators, but I would call to your attention not only the well publicized case of Anatoly Shcharansky, an effort which persisted over the course of nearly a decade, but also the recent case of Isai and Grigory Goldstein of Tblisi, who will be in Washington this week as well, whose plight was publicized in a concert sponsored by us and by the Helsinki Commission last summer, and who had been waiting, indeed, 15 years for their release.

No one can assure you or anyone else absolutely that any one event can be tied directly to an individual case without documentary evidence, but the pattern of attention being paid to urgent cases and the instances in which medical attention, transfer to better conditions, and change in diet for prisoners that followed in the wake of public protest affirms the value of these strategies.

Let me add that those who pursue these strategies do so at the behest of Soviet Jews. It is not only Shcharansky, who has been able to speak freely to us in recent days on such matters, but the people still in the Soviet Union, with whom we are in contact who ask this of us.

It is they who called for public pressure and they who make clear to us what they feel helps them and is in their best interest. It would take a deaf ear, a blind eye, and a heart of stone to listen to plaintive cries for help and to reject them.

Thank you for the opportunity to appear before the subcommittee.

[Statement follows:]

Prepared Statement of Mark A. Epstein

Mr. Chairman, Senator Metzenbaum, Members of the Subcommittee, I thank you for the opportunity to appear before you today and testify regarding the prosecution of rabbis and other concerned Americans before the Embassy of the USSR in Washington, on charges of demonstrating illegally within 500 feet of a diplomatic office.

As part of my testimony I will submit the defendants' proffer of evidence in the case of the United States of America v. Geraldine M. Lipkin, et al., prepared by their attorney, Seth P. Waxman. I am submitting the proffer because one of the defendants and two of the expert witnesses who had agreed to appear for the defense, myself included, are presenting testimony before the Subcommittee today.

Because the court ruled that the defense had not presented sufficient evidence to allow them to argue the common law defense of "defense of others" and the common law defense of "necessity," the proffer describes testimony which I would have given on that occasion. Rather than reiterating before the Subcommittee the information which will be entered into the record, I would like to address some general issues which seem to me central to the question of whether demonstrations and similar methods are effective ways to influence Soviet behavior, as my layman's understanding is that the necessity defense depends upon reasonable possibility of success.

One of the lessons which Anatoly Scharansky has been imparting to all of us in the last few days is the need for public action in addition to quiet diplomacy. Indeed, that has always been the philosophy of the Union of Councils for Soviet Jews, a grassroots organization with an actively involved lay leadership and membership.

Scharansky has been reminding us of what those who observe the Soviet Union on a daily basis understand all too well: the Soviet Union is insecure regarding its place in the world and its status as a super power, extremely sensitive to what it feels to be a tradition of slights at the hands of the West, and is prone to vociferous and aggressive behavior as a means of making its views known and having an impact on other nations. In the case of Soviet Jews, the Soviet authorities have employed physical attack, incarceration, vilification in the press, and other techniques to discredit them. They have gone so far as to establish special organs of State, such as the Anti-Zionist Committee of the Soviet Public, which is the handmaiden of the Association of Soviet Lawyers, with whom our own American Bar Association has recently signed an agreement of cooperation, in order to attack,

isolate, and suppress Soviet Jews interested in preserving their culture or emigrating. Likewise, the Soviet government, including its broadcast and print media, which are under the total control of the State, frequently respond with violent language to the interest and activities of American administrations, the Congress, and American citizens generally, with respect to Soviet Jews. There is no doubt that the Soviets are stung by such criticism, and are concerned about their image throughout the world, including the West.

In addition, we know that the standard diplomatic channels of the Soviet government do not necessarily report in full activities in the United States and elsewhere regarding Soviet Jews. We know that the question of policy toward Jews is not within the purview of foreign ministry but, rather, is a matter decided directly by the Politburo, and is under the administrative control of the KGB, the nefarious Soviet security service concerned with both internal and external affairs. This is analysis is confirmed by the memoir of Arkady Schevchenko, who deals with the issue explicitly.

Another factor which must be considered in choosing tactics and strategies for influencing Soviet policy toward Jews is to reflect on past experience. We have no doubt that public pressure, publicizing specific, individual cases has produced results, even in periods when the level of emigration has been painfully low. Furthermore, we know that one of the most effective ways of influencing behavior within the Soviet Union, of making the Soviet authorities aware of our interest in Soviet Jews generally, and in individual cases particularly, and of making sure the Soviets understand how informed and knowledgeable we are regarding the conditions of individual prisoners of conscience and others, is by orchestrating events which are so significant and extraordinary as to be reported in the press and monitored by Soviet authorities either from the print press, broadcasts or the intelligence system.

It was with this knowledge in mind that the various groups of rabbis and others chose to demonstrate in front of the Soviet Embassy. By doing so, they certainly created interest among the media, but that was at best a secondary benefit. By choosing the Embassy itself, and creating sufficient publicity as to require a diplomatic response, they assured that it would be impossible for Soviet embassy personnel to suppress knowledge of these embarrassing incidents here, and forced them to be reported to Moscow. In addition, the accounts of the demonstrations and trial which were broadcast into the USSR by radio assured not only that the interested community within the USSR would be aware of these events, but that Soviet monitors would transcribe

them and report them in their analysis of American broadcasting into the Soviet Union.

Mr. Chairman, I will not try the members' patience or take their time to discuss individual cases and brutalities against Soviet Jews which had taken place in the months prior to the series of demonstrations which led to the prosecutions being discussed here today, although such activities are continuing. Rather, I call to the Committee's attention not only the very well publicized case and subsequent release of Anatoly Scharansky, an effort which persisted over the course of nearly a decade, but also the case of Isai and Grigory Goldstein of Tblisi, who were recently released from the Soviet Union and have been visiting the United States in the past few days. Their case, in particular, was publicized by a concert last July, which we were proud to co-sponsor with the United States Helsinki Commission on the tenth anniversary of the signing of the Helsinki Accords. While I cannot provide the members of the Committee absolute assurance that any one event can be tied directly to an individual case without documentary evidence, the pattern of attention being paid to urgent cases, and the instances in which medical attention, transfer to better conditions, and change in diet have followed in the wake of public protest, affirms the value of these strategies.

Let me add that those who pursue such strategies do so at the behest of Soviet Jews. It is not only Scharansky, who has been able to speak freely to us in recent days of such matters, but people still in the Soviet Union with whom we are in contact ask this of us. It is they who call for public pressure, and they who make clear to us what they feel helps them and is in their best interest. It would take a deaf ear, a blind eye, and a heart of stone to listen to plaintive cries for help and to reject them.

I thank the Chairman, the ranking Member of the Minority, and the Subcommittee for the opportunity to appear before them. I will be happy to answer any questions they may wish to pose.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Criminal Division - Misdemeanor Branch

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V.	)	Nos. M16374-85, M16375-85,
	)	M16376-85, M16377-85,
GERALDINE M. LIPKIN, et al.,	)	M16378-85, M16379-85,
	)	M16380-85, M16381-85,
Defendants.	)	M16382-85
	)	

DEFENDANTS' PROFFER OF EVIDENCE

Defendants Geraldine M. Lipkin, William O. Graham, Nancy F. Frank, Dorothy Mahlin, Sergey V. Broude, Yosef I. Abramowitz, Konnilyn G. Feig, Ira I. Korinow, and June E. Daniels, through their undersigned counsel, hereby submit the following proffer of the evidence they intend to introduce, in addition to their own testimony, to support the defenses they intend to raise at trial.[1] These defenses, which have previously been disclosed and briefed, are: (1) the common-law defense of "defense of others"; (2) the common-law defense of "necessity"; and (3) justification under international law.

A. Government Reports and Documents. Defendants will introduce the following official government reports and documents, which detail the pervasive human rights violations being committed by the Soviet government against Soviet Jews who seek to teach Hebrew or Judaism, or who seek permission to emigrate so they may freely practice their religion:

1. Country Reports on Human Rights Practices for 1984: Report Submitted to the Committee on Foreign Relations, U.S. Senate, and Committee on Foreign Affairs, U.S. House of Representatives by the Department of State in Accordance with Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as Amended, S. Print 99-6, 99th Cong., 1st Sess. 1119-1135 (H. Comm. Print, Feb. 1985).

2. U.S. Department of State, Nineteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of the Helsinki Final Act, April 1, 1985-October 1, 1985 (1985) at 3-4, 12-13, 19, 58, 64 (approved final draft).

3. U.S. Department of State, Eighteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of Helsinki Final Act, October 1, 1984 - April 1, 1985 at 2-3, 25 (Spec. Rep. No. 130).

4. Basket Three: Implementation of the Helsinki Accords: Hearing before the Commission on Security and Cooperation in Europe, Vol. VI, 95th Cong., 2d Sess. (1978).

5. Soviet Jewry: Hearings Before the Subcommittee on Europe of the House Committee on Foreign Affairs, 92d Cong., 5th Sess. (Nov. 1971).

6. U.S. Department of State, Report: The Soviet Crackdown on Jewish Cultural Activists (Jan. 29, 1985);

7. U.S. Department of State, Press Statement: Soviet Persecution of Jewish Cultural Activists (June 14, 1985);

8. U.S. Department of State, Briefing Paper: Soviet Human Rights (Fall 1984);

9. Plenary Statement by U.S. Ambassador Richard Schifter on Discrimination Against National Minorities to HREM Meeting of the Commission on Security and Cooperation in Europe (May 28, 1985).

10. Plenary Statement by U.S. Ambassador Richard Schifter on Freedom of Religion in the U.S.S.R. and Czechoslovakia to HREM Meeting of the Commission on Security and Cooperation in Europe (May 17, 1985).

Since these documents are public records and reports, they are self-authenticating. See Fed. R. Evid. 902(2),(5),(10); Super. Ct. Civ. R. 44. They are also exempt from hearsay objection, under long-standing and familiar doctrine. See, e.g., Fed. R. Evid. 803(8); Super. Ct. Civ. R. 43-I; Super Ct. Crim. R. 57; United States v. Kuhn, 4 Cranch, C.C. 401, 4 D.C. 401 (C.C.D.C. 1833) (Fed. Cas. No. 15, 545); Williams v. Overholser, 151 F.2d 457 (D.C. Cir. 1945), cert. denied, 327 U.S. 808 (1946); Gaston v. United States, 34 A.2d 353 (D.C. Mun. App. 1943), aff'd, 143 F.2d 10 (D.C. Cir.), cert. denied, 322 U.S. 764 (1944); United States v. AT & T, 498 F. Supp. 353 (D.D.C. 1980); Leikin v. Wilson, 445 A.2d 993 (D.C. 1982).

These documents are replete with findings and conclusions made by official agencies and representatives of the

United States government who are specifically charged by law with investigating and reporting accurately on Soviet compliance with its international human rights obligations. The first document listed above, for example, is the most recent of a series of annual reports published by the Department of State under statutory mandate, which reviews the human rights practices of virtually every country in the world during the preceeding year. 1/ That report -- which several of the defendants had reviewed long before October 22, 1985, when they congregated in front of the Soviet Embassy -- includes the following findings and conclusions: 2/

> (P. 1119): "Soviet performance in the realm of human right fails to meet accepted international standards. The regime's response to efforts to exercise freedom of expression is to incarcerate those concerned in prison, labor camps, or psychiatric hospitals. Mistreatment of political prisoners has a long history and continued in 1984. Inadequate food, clothing, and shelter, heavy manual labor, unsatisfactory medical care, isolation, extended interrogation, and threats against prisoner's families are characteristic abuses. Many prisoners are denied the right to correspond with their families or to receive family visits. Some are confined to special psychiatric hospitals in the psychiatric wards in general hospitals where they are often subjective to cruel and degrading treatment and administered doses of powerful and painful drugs. The regime also continues to exile prisoners to remote areas of the Soviet Union or to force them to emigrate."
>
> (P. 1119): "Persecution of individuals who attempt to express themselves outside the framework of state-control organs increased during 1984. Human rights monitors, religious believers, proponents of greater cultural and political rights for ethnic minorities, and peace activists were all subject to arrest and imprisonment. Sentences to psychiatric hospitals and labor camps contributed to the deaths of several human rights activists."

1/ The Annual Report covering the year 1985 will be released in February 1986.

2/ The names of Jewish political prisoners mentioned in these findings are underscored herein.

(P. 1120): "[T]he authorities have further cut back Jewish emigration from the Soviet Union, which had been reduced steadily in recent years. Some officials have made blatantly false statements that all those Jews who wanted to emigrate have already left. These statements coincided with a significant increase in official expressions of anti-Semitism, lead by the 'Anti-Zionist Committee of the Soviet Public.'"

(P. 1120): [I]t is not unusual for people to be arrested or confined in psychiatric facilities without next of kin being notified."

(P. 1121): "It is clear that mistreatment of political prisoners during incarceration and interrogation does occur. . . . Among the victims of such abuses in 1984 were Yakov Levin, an Odessa refusenik, who sustained life-threatening injuries from beatings following his October 16 arrest; Iosef Berenshtein, a Kiev Hebrew teacher who was savagely beaten and blinded while in prison following his December 12 trial. . .. Prisoners are more frequently subjected to psychological pressures such as isolation, extended interrogation, and threats against their families. The security organs of the Government are responsible for these abuses."

(P. 1121): "The Government continues to confine political and religious activists to psychiatric hospitals where they are often subjected to painful drugs not in standard psychiatric use. This treatment is, in reality, a form of torture. . . . The Soviet Union withdrew from the World Psychiatric Association in February 1983 rather than face probable censure from that body for its abuses of psychiatry."

(P. 1122): The provisions of laws [sic] under which prosecution have occurred are sufficiently broad that they can be and are used to prosecute individuals for the exercise of internationally recognized human rights. [The provisions are herein specified and explained.] Dissidents are sometimes fired from their jobs, then arrested for parasitism because they have no jobs; or they may face fabricated charges for common crimes, such as theft of socialist property, or possession of drugs or weapons."

(P. 1123): "In 1984 the Soviet Government announced changes to existing legislation which carried serious negative implications for political prisoners and human rights activists."

(P. 1123): "The practice of exiling political dissenters . . . continues under Soviet rule. . . . Persons released from exile often are not allowed to return to their former places of residence. . . . In addition to internal

exile, exile abroad is also occasionally employed against dissidents."

(P. 1124): "Soviet authorities frequently ensure that political trials are closed to the public . . . . Western journalists and diplomats are regularly denied access to political trials and permission to visit cities outside Moscow where trials are taking place."

(P. 1124): "Defense attorneys, like judges, are subject to extra-legal regime pressures and constraints. . . . They must, moreover, have special clearance to act as defense counsel in a political case. Attorneys who overstep their assigned role of providing a pro forma defense risk losing their clearance and can jeopardize their professional standing."

(P. 1124) "There has been no known instance of acquittal in a political trial since the October 1917 Revolution."

(P. 1124): "Psychiatric commitment of dissidents . . . is a process which allows the Government to circumvent many of the requirements of the legal process and to incarcerate activists at the discretion of officials and psychiatrists."

(P. 1125): "Government interference in personal life is pervasive. . . . They electronically monitor the residences and telephones of Soviet citizens . . . . [W]ell-documented cases of forced entry and illegal searches continued in 1984."

(P. 1125): "Through their control of mail and telephone circuits, the authorities selectively restrict contact between citizens and foreigners."

(P. 1125): "In practice, the Government does not tolerate dissident behavior and has not hesitated to imprison persons for exercising freedom of expression, even when their action did not violate Soviet law."

(P. 1126): "The authors of literary, religious, and political samizdat (self-published) materials have been subject to a wide range of harassment, including loss of employment, warnings from the Committee for State Security (KGB), apartment searches, and ultimately, arrest and conviction, or incarceration in mental hospitals."

(P. 1127): "As a result of a campaign during the last few years, all independent human rights or peace groups have been suppressed and have ceased functioning."

(P. 1128): "Participation in religious ceremonies causes exclusion from the Communist Party and, sometimes, dismissal from

employment. Soviet law requires religious congregations with a minimum of 20 adults to register with the authorities. In practice, the authorities reserve the right to grant or withhold registration. . . . Religious believers, moreover, are prohibited from engaging in charitable activit[ies], proselytizing, or providing religious training to their children. In some instances, the authorities have removed children from families which have permitted or have conducted such instruction."

(P. 1129): "The Jewish community faced an exceptionally difficult year in 1984, which saw a sharp increase in official anti-Semitic propaganda thinly veiled as anti-Zionism. The 'Anti-Zionist Committee of the Soviet Public,' under the chairmanship of Col. Gen. D. A. Dragunskiy, staged several press conferences, one specifically designed to link Zionists to Nazis. A television program aired in Moscow in November repeated this theme and accused Jewish leaders of conspiring with the Nazis to send Jews to the death camps. The authorities' patently false propaganda line, espoused by the Committee, continues to assert that the Jewish emigration 'problem' has been solved since any Jews who wanted to leave the Soviet Union have already done so. The overall atmostphere of the anti-Semitism was as bad in 1984 as it has been at any time in the past several decades."

(PP. 1129-30): "There have been numerous reports of discrimination against Jews, such as denial of access to higher education and certain professions. Such revocation of degrees in practice means the end of one's career, and usually the loss of one's job and income. Many individual Jewish 'refuseniks' (Jews who have been refused permission to emigrate) were arrested and/or put on trial in 1984."

"Moshe Abramov of Samarkand was sentenced to 3 years in a labor camp for hooliganism when he reportedly refused to withdraw his emigration application. Jewish activist Zakhar Zunshaine from Riga was sentenced on June 29 to 3 years in a labor camp for doing little more than writing letters on behalf of his own family's emigration efforts. Accused of evading the draft since 1977, Moscow refusenik Aleksandr Yakir was only arrested after he had passed his 28th birthday and was no longer legally eligible for induction. He was nevertheless sentenced to 2 years in a labor camp. Iosif Begun, who was sentenced in 1983 to 7 years in a labor camp and 5 years of internal exile, was placed in special confinement for infringement of camp rules in May 1984. Scheduled to remain there for six months, he began a hunger strike and was hospitalized in June."

(P. 1130): "July [1984] saw the beginning of a major, sustained crackdown on Hebrew teachers and other Jewish cultural activists. By year's end, nine activists, including four Hebrew teachers, had been arrested and three sentenced to labor camp. The arrests were accompanied by a series of searches, beatings, and threats which sent shockwaves through the Soviet Jewish community. Moscow Hebrew teachers Aleksander Kholmianskiy and Yuliy Edelstein were arrested in late summer, respectively, for hooliganism and possession of drugs. . . . In December, Edelstein was sentence to three years in a labor camp. Yakov Levin, a Jewish activist from Odessa, was sentenced to 3 years in prison on charges of anti-Soviet slander for circulating religious materials. His prospective father-in-law, Mark Nepomnyashchiy, was also arrested. Their friend, refusenik Yakov Mesh, was arrested in October on trumped-up of charges of resisting the police. The authorities released Mesh and dropped charges against him in December due to the severe injuries he sustained from a beating administered following his arrest. Iosef Berenshtein, a Kiev Hebrew teacher, was sentenced to 3 years in a labor camp in December, also for allegedly resisting the police. He too was savagely beaten while in custody.

(P. 1130): "[T]he Government has structured career incentives in such a way as to virtually exclude practicing believers from educational opportunities and desirable careers."

(P. 1131): "The practice of religion is also discouraged by strictly applied limitations on the number of sacred books, such as the Bible or the Koran, which may be printed and by government prohibitions against their importation. Few works are published in Hebrew."

(P. 1131): "Freedom of movement is neither guaranteed by law nor respected in practice."

(P. 1131): "The U.S.S.R. has ratified the U.N. Charter and other international documents in which the right to leave one's country and return thereto is recognized. In reality, however, Soviet law does not recognize the right of citizens to emigrate by choice, and the only recognized motive for emigration is reunification of divided families."

(P. 1131): "There was a continued sharp drop in the number of Jews allowed to emigrate in 1984: 896 compared to approximately 1,300 in 1983 and over 51,000 during 1979. Many Jews have waited in vain for more than 10 years for permission to emigrate. Jewish sources estimate that there are still more that 200,000 Soviet Jews who possess the letters of invitation (byzovs) from Israel necessary for application to emigrate."

(P. 1132): "Jewish emigrants departing for Israel are required to formally renounce Soviet citizenship prior to departure, thus effectively precluding their return to the U.S.S.R. as Soviets citizens."

(P. 1133): "The authorities do not permit foreigners to investigate the status of human rights in the U.S.S.R. International human rights organizations such as Amnesty International have frequently addressed communications to the Soviet Government concerning human rights, but the authorities have declined to reply in a substantive manner."

(P. 1134): "In recent years, numerous reports and investigations by activists have noted restrictions on the presence of Jews and members of other ethnic groups in universities, research institutes, and other organizations."

The second source listed is another report which the President is required by law to produce semianually. The most recent report, covering the period April 1, 1985-October 1, 1985, includes the following findings and conclusions:

(P. 3): "Persecution by the Soviet authorities of Soviet citizens who attempted to express themselves freely continued at an alarming rate during the six months under review. Religious believers . . . were subjected to harassment and often to arrest and imprisonment. A campaign against Hebrew teachers and Jewish cultural activists continued, bringing the number of Jewish political prisoners to at least 22."

(P. 4): Andrey Sakharov and his wife Yelena Bonner remained in isolation, apparently still confined to the closed city of Gor'kiy. Doubts increased concerning their whereabouts and condition as they were denied contact with friends and relatives. Anatoliy Scharanskiy spent most of the review period in the internal prison of a labor camp. Yuriy Orlov remained exiled and isolated in the desolate province of Yakutia, while many other human rights activists remained prisoners, some with newly extended terms. Political prisoners often endured strict confinement and frequently were not permitted family visits or letters. Soviet abuse of psychiatry for political purposes continued unabated, as did poor conditions in labor camp cells and some beatings."

(P. 4): "The rate of emigration from the Soviet Union remained low. Some 457 Jews left the Soviet Union from April 1 to August 31, 1985. The extremely low level of Jewish emigration was accompanied by a continuation of official 'Anti-Zionist' propaganda."

(P. 12): "Soviet performance in the field of human rights ([Helsinki] Principle Seven) continued to be poor during the six-month review period despite the May Ottawa Human Rights Experts Meeting. . . . Soviet persecution of dissidents, refuseniks, and religious activists continued unabated, as did suppression of national minorities and harassment of political prisoners and their families."

(P. 12): "The current review period was marked by a continued crack-down on Jewish (primarily refusenik) cultural activists and teachers of Hebrew. (A refusenik is a Jew who has been denied permission to emigrate.) Moscow Hebrew teacher Dmitriy (Dan) Shapiro was brought to trial June 26. After reportedly being subjected to threat of severe punishment and other forms of pressure, Shapiro signed a 'confession' to Zionist and anti-Soviet activities. Later broadcast on Soviet national television, Shapiro's statement named several Jewish 'collaborators,' many of whom in fact did not know him well. Shapiro was given a suspended sentence, but his public 'confession' was widely interpreted as a stern warning against the assertion of Jewish culture and identity."

(P. 12): "Other arrests and trials of Hebrew teachers reinforced the climate of repression. Leningrad Hebrew teacher Roald Zelichonok was tried August 8, and sentenced to three years in a labor camp for anti-Soviet slander, apparently on the basis of statements made in private letters. Leonid Volvovskiy, already exiled from Moscow to the closed city of Gor'kiy, was arrested June 25, and charged with anti-Soviet slander after hostile local newspaper articles were published and anti-Semitic slogans appeared on a wall outside his apartment. Yevgeniy Koifman was arrested June 18 and tried in mid-September in Dnepropetrovsk for alleged possession of narcotics. He was sentenced to two and one-half years of strict parole away from home. Yevgeniy Aisenberg of Kharkov was sentenced in early June to two and one-half years in a labor camp for anti-Soviet slander. Since teaching Hebrew is not illegal, the authorities continued the pattern of finding other pretexts for arrests."

(P. 13): "The wave of arrests and trials of Hebrew teachers and other Jews in the previous review period left many imprisoned in the current period. Iosef Begun was transferred from a labor camp to Christopol prison, apparently for violations of camp rules. His wife and son were repeatedly warned by Soviet authorities to cease activities on his behalf, such as hunger strikes and press conferences. Iosif Berenshtein underwent medical treatment following an attack inside a labor camp, but was transferred back to a camp at Zholtye Vody with little chance of

regaining his sight. Aleksandr Kholmyanskiy, another imprisoned Hebrew teacher, also suffered ill health. Semyon Shnirman, serving his second labor camp term, was being investigated in September for violation for camp rules under a new law which permits extension of labor camp sentences for such offenses as washing clothes or wearing a cap at an improper time. Samuel Epshtein, serving a term for anti-Soviet slander, had his term extended by two years under the same law. The number of Hebrew teachers and other Jews imprisoned for political reasons was conservatively estimated at 22 at the end of the current review."

(P. 13): "The current review period has also witnessed a continuation of past patterns of thinly veiled and hostile 'anti-Zionist' rhetoric. Soviet propaganda maintains that Israeli and Western intelligence agencies encourage emigration in order to obtain state secrets from Soviet citizens. It further alleges that 'Zionists' collaborated with fascists during World War II to send many innocent Jews to their death. These 'Zionist elements,' so the argument goes, now comprise the ruling circles of Israel, which have inherited Hitler's fascist mantle. The 'Anti-Zionist Committee of the Soviet Public,' an officially sanctioned group, continues to lead the propaganda attack against Jewish refuseniks and 'Zionists.' A Soviet TV documentary and a new Soviet 'White Book' have alleged links between 'Zionists' activities and Western intelligence organizations."

(P. 19): "Despite commitments under the Helsinki Final Act to facilitate family reunification, the Soviet Union continues to deny exit permission to thousands of its citizens who wish to join relatives living abroad. Jewish emigration continued at a very low level compared to the peak year of 1979, when over 50,000 left the country. The Soviet authorities continued to maintain, in the face of abundant evidence to the contrary, that the vast majority of Jews who wanted to leave the country have already left and that the rate of emigration is declining naturally as fewer and fewer families remain to be reunited."

(P. 58): "The U.S. Government continues to make regular representations to the Soviets on behalf of applicants for U.S. visitor's visas. Regrettably during the reporting period, the interventions have not achieved results."

(P. 64): "Some individuals have been seeking Soviet exit permission for more than a decade. Our Embassy in Moscow also has a list of individuals who have repeatedly been denied Soviet exit permission to Israel, but continued to apply. . . . It remains clear that each year several thousand Soviet citizens apply for and are denied exit

permission to join relatives abroad. While we continued to intervene in support of Soviet citizens applying for exit permission, Soviet authorities have been completely unresponsive to these representations during the reporting period."

Official State Department briefing papers and subject reports are even more to the point. The most recent report, listed as Document 8 supra, states in full:

SOVIET PERSECUTION OF JEWISH CULTURAL ACTIVISTS

On June 11 Soviet authorities in Leningrad arrested Roald Zelichonok, a Jewish scientist and Hebrew teacher. Five days earlier, another Hebrew teacher, Yevgeniy Aizenberg of Kharkov, was sentenced to two and a half years in a labor camp. Moscow Hebrew teacher Dan Shapiro has been denied contact with his lawyer as he languishes in a Soviet prison awaiting trial. All together, Soviet authorities have arrested at least fourteen Jewish cultural activists, including seven Hebrew teachers, since last July.

They are the chief victims in what appears to be an official Soviet campaign against the current revival of Jewish culture in the Soviet Union. To date, ten of these men have been convicted, several on crudely trumped-up criminal charges specifically designed to discredit them. Two were savagely beaten following their arrests. We have also heard disturbing reports that a third, Yuliy Edelstein, is being subjected to repeated beatings at the labor camp in Siberia where he is serving a three year sentence.

In addition to the arrests and beatings, many Jews have been fired from their jobs, have had their apartments searched, their phones disconnected, their mail seized. Articles have appeared in Soviet newspapers and programs on Soviet television branding Hebrew teachers and other Jewish cultural activists (often by name) as "Zionist" subversives. Zionism has been equated with Nazism and World War II Jewish leaders accused of helping the Nazis round up Jews for the death camps. Although Soviet authorities claim that their campaign is directed solely against those they label as Zionists, there is no doubt that repeated irresponsible charges like these can fan the ugly flames of anti-Semitism.

The Soviet Jews who are being singled out for persecution have in common a desire to preserve their ethnic heritage, to teach and learn their historic language and to be free to leave the Soviet Union for the country of their choice. The most serious action

committed by any of them has been to protest orally or in writing their terrible treatment by Soviet authorities. For this they have been arrested, beaten, isolated, vilified, imprisoned.

We wish to emphasize the extreme seriousness with which we regard these developments. The continuation of this campaign constitutes a real obstacle to the constructive relations with the Soviet Union that the United States seeks. We call upon the Soviet Union to end this tragic and needless campaign. Soviet commitments freely undertaken at Helsinki and elsewhere require it, and simple human decency demands it.

In addition to these documents, on which the defendants relied in deciding to congregate in front of the Soviet Embassy, defendants will also offer live testimony of the following individuals:

B. Dina Kaminskaya. For 37 years, until she was disbarred and forced to leave the country in November 1977 for attempting to represent the well-known refusenik Anatoliy Scharanskiy, Dina Kaminskaya was a criminal defense attorney in Moscow. During 1960s and 1970s she was the preeminent Moscow defense counsel for refuseniks and other Jews charged with political offenses. She represented scores of well-known victims of Soviet oppression who were prosecuted and tried in the Soviet Union, including Aleksandr Ginzburg, Pascha Abramovitz, and Aleksandr Lerner. Ms. Kaminskaya has since published an acclaimed book, The Final Judgment (Simon & Schuster 1982), about her representation of these and other Soviet Jewish activists.

Ms. Kaminskaya will testify, based on personal, first-hand knowledge, of Soviet persecution of, and denial of fundamental human rights to, Jewish activists and refuseniks. Ms. Kaminskaya herself has witnessed this persecution in, among others, the following forms:

a) arrests, trials, and convictions on baseless charges;

b) forced confinement in "special" psychiatric facilities, and forced administration of drugs, to mentally stable activists, some of whom were never even charged with any offense;

c) beatings and abductions of Jewish activists by Soviet police;

d) innumerable illegal searches of homes and offices, wholesale seizures of Hebrew or Jewish books, and planting of incriminating materials and contraband in refuseniks homes during searches;

e) refusal of Soviet authorities (violation of Soviet law) to allow Jewish defendants in political trials to retain defense counsel of choice, and to allow anything beyond pro-forma representation at trial; and

f) gross and officially sanctioned maltreatment of Jewish political prisoners.

C. Konstantin Simes. Mr. Simes is a Soviet legal scholar and a former Soviet defense attorney. He was principally responsible for the drafting of a major recodification of the Soviet laws relating to non-political crimes. He also served as a defense attorney in Moscow for 17 years before he himself was indicted by the Moscow prosecutor in 1977 and ultimately expelled on charges stemming from a police seizure, during an illegal search of his home, of a manuscript written by him which is now a well-known book, The Corrupt Society (Simon & Schuster 1980).

Mr. Simes will offer first-hand testimony substantially similar in nature to Ms. Kaminskaya. He will explain that many of the acts taken by the government against refuseniks and Jewish teachers and activists violate Soviet law. In political cases, especially those involving Jews, the Soviets frequently ignore even the provisions and safeguards of their own statutes and constitution.

Both Mr. Simes and Ms. Kaminskaya have served as consultants to the U.S. Helsinki Commission and are employed by the Voice of America and Radio Liberty. They have broadcast to the Soviet Union, for example, details of the demonstrations held by defendants and others in front of the Soviet Embassy and the trials that have occurred. It is the strong opinion of both Mr. Simes and Ms. Kaminskaya that these demonstrations have a palpable effect on Soviet treatment of its Jewish population, particularly those it has singled out for harassment and

prosecution. In their considerable experience, it is only the pressure of public opinion that has saved Soviet Jewry and Jewish political prisoners from even greater abuses. Mr. Simes and Ms. Kaminskaya will testify that public protests do have an effect on Soviet decisionmakers, especially when they are focused on individual cases. In their opinion, demonstrations in front of the Soviet Embassy are particularly effective because they receive maximum publicity in the Soviet Union and because Soviet diplomats in the Embassy are obliged to report such events to the Soviet Foreign Ministry and Central Committee.

D. Ambassador Richard T. Davies. Ambassador Davies is the president of the Research Center for Religion and Human Rights in Closed Societies, a nonprofit organization which investigates and publicizes religious persecution and human rights violations in the "closed" societies -- primarily the Soviet Union. Ambassador Davies assumed this post after a distinguished career in the Foreign Service, where he served as Ambassador to Poland, Second Secretary and Counselor for Political Affairs in the American Embassy in Moscow, and as Deputy Assistant Secretary of State for European Affairs. He will testify both on human rights treatment of religious minorities in the Soviet Union and also based on his extensive familiarity with the Department of State and diplomatic relations with the Soviet Union.

Ambassador Davies will testify that at least since his tenure as Deputy Assistant Secretary of State, Soviet human rights violations and persecution of Jews has occurred systematically. Moreover, it has dramatically increased in the past year or two. Ambassador Davies will explain the methods employed by our government to monitor these violations of international law and the means used to attempt to convince the Soviets to desist from, or at least to moderate, their conduct in this regard. Mr. Davies will explain the current policy of the United States government with regard to Soviet human rights

compliance. He will state that in his expert opinion this policy is ineffective and that this ineffectiveness may have contributed to the decision to escalate harassment and prosecution of Hebrew teachers over the past two years. Ambassador Davies will also explain the reasons for his opinion.

Ambassador Davies will describe the considerable impact publicity has on Soviet actions, especially vis-a-vis treatment of individual Soviet political prisoners. This publicity, in his view, was responsible, for example, for the recent release of Yelena Bonner, the commutation of death sentences for the defendants in the famous Leningrad trials and numerous other acts of moderation in individual cases by the Soviet government.

Ambassador Davies will state that defendants' demonstration was an act well-designed to impact Soviet policy. Because it was in close proximity to the Embassy, it (1) sent a direct message to the Soviet diplomats inside the Embassy; (2) ensured maximum media coverage; (3) increased the eloquence of the political statement made; and (4) had a galvanizing effect on the American public and hence on American political leaders. Mr. Davies will explain that arousing public opinion is the most effective means American citizens have to affect Soviet treatment of political prisoners. This prompts Congress to take strong steps (witness, for example, the Jackson-Vanik Amendment and reactions by congressmen to the recent arrests in front of the Soviet Embassy). Moreover, demonstrations in proximity to the Embassy have a direct effect on Soviet diplomats, who reflect this in their cables and recommendations. In conclusion, Ambassador Davies will state, defendants' October 22d demonstration was an effective step -- perhaps the most effective step defendants possibly could have taken -- to pressure the Soviet government to moderate its human rights practices and in particular to temper its treatment of the Jewish activists upon whom the defendants focused.

E. Dr. Mark Epstein. Mr. Epstein is the Executive Director of the Union of Councils of Soviet Jews ("UCSJ"), which is one of the largest and most active groups dedicated to the human rights of Soviet Jews. With member councils and affiliates across the United States and abroad, and with substantial, often clandestine, activities in the Soviet Union, UCSJ is widely recognized as the single best-informed organization -- government or private -- about developments in the Soviet Union with regard to treatment of Soviet activists, refuseniks, and Hebrew teachers. All of the defendants are officers or members of UCSJ.

Dr. Epstein will be qualified as an expert on the state of the contemporary Soviet Jewish community and on human rights efforts to save Soviet Jewry. He will testify first about the means by which UCSJ gathers current information on the status and treatment of Soviet Jews and other Soviet minorities. These means include the following:

1. Interview and interrogation of recent Soviet emigres;

2. Written and telephone reports by UCSJ correspondents and other human rights activists in the Soviet Union;

3. Written statements and telephone calls from refuseniks and other persecuted Soviet Jews and their families;

4. Analysis of documents, transcripts, and tape recordings of official Soviet proceedings obtained by clandestine means. (Dr. Epstein will produce representative samples of these documents);

5. Direct visits to the Soviet Union by UCSJ members and others sponsored and assisted by UCSJ, including lawyers, human rights experts, and Sovietologists;

6. Analysis of data obtained by official agencies of the United States government, the Israeli government, other foreign governments, and international organizations such as the United Nations;

7. Information from other human rights groups, including Amnesty International, Helsinki Watch, etc.;

8. Analysis of Soviet print and electronic media;

9. Analysis of clandestine samizdat (self-published) materials.

Dr. Epstein will then testify about the status of Soviet treatment of Jewish activists and Hebrew teachers as of October 1985, when the defendants' demonstration occurred. He will testify, based on official government reports, first-hand observations, and information from other sources listed above that openly practicing and active Soviet Jews were facing a progressively worsening situation, with several individuals undergoing severe persecution, including life-threatening attacks, for wholly legitimate activities. Dr. Epstein will testify that the defendants in this case were all present in Washington for several days prior to their demonstration as participants in UCSJ's national convention. They were all exhaustively briefed and updated on the current status of Soviet Jewry and were made well aware of the desperate plight of several individuals, whose names and circumstances as of October 22, 1985, were as follows:

> 1. Leonid Volvovsky. After applying to emigrate in 1974, Mr. Volvovsky was fired from his position as a senior researcher. He began studying Hebrew, ultimately becoming one of the few advanced Hebrew teachers in Moscow. His permit to reside in Moscow was then revoked and he was exiled to the closed city of Gor'kiy. After repeated, documented harassment, Mr. Volvovsky was arrested on June 25, 1983, on the basis of religious materials found by the police during a search and seizure of his apartment. He was charged with anti-Soviet slander and propaganda and held until his trial, which began 16 months later on October 18, 1985. On October 22, 1985 -- the date of defendants' demonstration, the Volvovsky trial was in progress. 3/
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> 2. Roald Zelichenok. Mr. Zelichenok, a Hebrew teacher in Leningrad, was arrested in June 1985 following a search of his home, in which a typewriter and books were confiscated. He was charged with anti-Soviet slander based on confiscated letters to friends in the West. (The letters were intercepted in violation of the International Postal Agreements.) Mr. Zelichenok was tried on August 8th, 1985, and although both he and

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3/ The following day, October 23, 1985, Mr. Volvosky was convicted and sentenced to three years in an unspecified labo. camp. On December 5th, 1985, his appeal was summarily denied.

his wife are desperately ill, he was sentenced to three years imprisonment. The defendants and others sought to pressure the Soviet government, at a minimum, to transfer Mr. Zelichenok to a more humane facility in light of his very poor health. 4/

3. Iosif Berenshtein. Mr. Berenshtein is a Soviet engineer who was fired after he and his family applied to emigrate to Israel in 1979. He became a Hebrew teacher in Kiev. From that time until his arrest in November 1984 he was repeatedly harassed by the KGB and twice officially detained for 15 days for having participated in a delegation to the Supreme Soviet. He was arrested on November 12, 1984, for "resisting the police in the execution of their duty," and tried three weeks later in the remote town of Novograd-Volynsk. He was convicted and sentenced to four years in a labor camp. Beatings in the camp left him totally blind in one eye and with only 10% vision in the other. After numerous and extensive appeals from the West, including a congressional subcommittee, he was hospitalized. Soviet doctors reported, however, that nothing could be done to restore his vision and he was transferred back to prison. On October 22, 1985, he was back in the prison camp. Shortly thereafter Soviet authorities agreed to place Mr. Berenshtein in on a one-month medical treatment program.

4. Evgeny Aisenberg. Mr. Aisenberg is a senior engineer formerly living in Kharkov, in the Ukraine. He applied for an exit visa to Israel but his application was denied and he was fired from his job. He became a Hebrew teacher. After participating in a public celebration of the Jewish festival of Purim in March 1985, Mr. Aisenberg was arrested and charged with "spreading false information and defaming the Soviet Union." He was tried on June 6, 1985, and sentenced to two and a half-year in a labor camp. Recently his sentence was commuted to one year.

5. Yuli Edelshtein. Mr. Edelstein, a Moscow Hebrew teacher, was arrested and sentenced to three years in prison in December 1984 following repeated harassment of his family and an illegal KGB search which allegedly "found" drugs in a matchbox in his home. Confiscated in the search were all of the family's Hebrew books and personal gifts left by foreign visitors -- whom Soviet officials accused of corrupting Jewish youth with medieval and mystic drug rituals. There is documented evidence that Mr. Edelshtein has been beaten regularly in prison camp at the instigation of camp authorities. His wife was advised by officials that they were trying to "exorcise" her husband's religious

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4/ In late November 1985, Mr. Zelichinok was indeed transferred to a camp facility in the Komi Republic of the Soviet Union.

fanaticism. In early October 1985, Mr. Edelshtein lost several teeth during one of these "exorcisms." His wife has repeatedly been denied the right to visit.

All of these individuals are mentioned in official United States government reports. Their circumstances were well-known to the defendants prior to the October 22, 1985 protest.

Dr. Epstein will also testify that the UCSJ and its officers and members, including Dr. Epstein and each of the defendants, are involved in many other types of efforts to bring about a change in Soviet policies and practices with respect to its Jewish citizens. These means include:

1. Meetings with executive branch officials, including the President of the United States, the Secretaries of State and Commerce, and many of their subordinates;

2. Encouraging and assisting intervention by these officials and other representatives of the United States Government with the Soviet Embassy and Soviet officials on the issue of treatment of Soviet Jews.

3. Briefing and encouraging public and private advocacy by the United States Helsinki Commission and its congressional commissioners;

4. Regular briefing of members of Congress, and encouraging and supporting visits by Members and their staffs to the Soviet Union in order to meet with Soviet officials and with refuseniks;

5. Campaigns of letter writing, telegrams, postcards, and other communications to Soviet officials through the diplomatic offices in the United States and Europe, as well as to Soviet officials in the Soviet Union;

6. Public lectures and programs designed to publicize the plight of Soviet Jews in general and particular refuseniks;

7. Extensive programming in conjunction with Voice of America and Radio Liberty broadcasts to the Soviet Union publicizing activities in this country and abroad and also reporting on Soviet acts of oppression.

8. Arranging the intervention and help of Western European and other Western governments in their meetings with Soviet officials;

9. Peaceful, public demonstrations in the United States, Europe, and Israel on behalf of Soviet Jews;

10. Briefing and training Americans visiting the Soviet Union on official delegations to enable them to ask knowledgeable questions about treatment of Soviet Jews;

11. Advertisements in newspapers and other publications, addressed to the Soviet Government and to United States Government regarding treatment of Soviet Jews;

12. Telephone campaigns, including calls to Soviet officials;

13. Letter-writing campaigns to refuseniks, American and other Western officials;

14. Programs by which young Jews outside the Soviet Union are "twinned" with Jewish children in the Soviet Union in anticipation of Bar or Bat Mitzvot;

15. Encouraging and supporting trips by members of the legal and medical professions in order to meet with the Soviets and to consult with refuseniks regarding their situation and make their needs known in the West;

16. Peaceful demonstrations at the Soviet consulates in New York and San Francisco, which have resulted in arrests but not in prosecutions;

17. Peaceful demonstrations at Soviet cultural events in the United States;

18. Hunger strikes, fasts, vigils, and other similar acts;

19. Regular publication and distribution of information about the plight of Soviet Jews;

20. Releases and interviews for the benefit of the public media.

Dr. Epstein will testify that although at various times these efforts have been efficacious in achieving limited results, unfortunately, to date they have not yet resulted in a Soviet decision to cease mistreatment of refuseniks, Hebrew teachers, and other openly practicing Soviet Jews. In particular, these alternate means have not succeeded in preventing the Soviet government's recently escalated campaign of persecution against Soviet Hebrew teachers.

Dr. Epstein will testify that because of this UCSJ approved the peaceful demonstrations in front of the Soviet

Embassy conducted by the defendants and other groups. UCSJ communicated this approval to its members. Dr. Epstein will explain why this type of demonstration at this time was considered necessary to relieve the persecution of Soviet Jewry in general and the individual Soviet Hebrew teachers discussed above in particular. Dr. Epstein will also provide an analysis about why this and other demonstrations directly in front of the Soviet Embassy are likely to affect Soviet actions, especially with respect to the individual prisoners upon which the demonstrations have focused. He will also explain to the court the basis for his conclusion that these demonstrations in fact are having such an effect.

F. Testimony of Jerome J. Shestack, Esquire. Mr. Shestack is a senior partner in the Philadelphia law firm of Schnader, Harrison, Segal & Lewis. He previously served as United States Representative to the United Nations Commission on Human Rights and Alternate Representative to the United Nations General Assembly. He has served as Senior Advisor to the United States delegation to the Helsinki Conference, and is currently the president of the International League for Human Rights. Mr. Shestack is a recognized expert on international human rights law, and he will testify as such on behalf of the defense.

Mr. Shestack will testify that the findings and conclusions made by the Department of State in the documents identified above establish beyond question that the government of the Soviet Union has systematically violated a number of international agreements, statutes and conventions which have been signed by, and are binding upon both the United States and the Soviet Union. These agreements include:

1. The Universal Declaration of Human Rights, General Assembly Resolution 2200 (1966);

2. The International Covenant on Civil and Political Rights (Annex to General Assembly Resolution 2200 (1966));

3. The International Covenant on the Elimination of All Forms of Racial Discriminations, Assembly Resolution 2106A (XX) (1965);

4. The Declarations on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, General Assembly Resolution 3452 (XXX) (1975);

5. The Nuremberg Principles. Charter of the International Military Tribunal, August 8, 1945, and other 6, 1945, 59 Stat. 1544, E.A.S. 472;

6. The Helsinki Accords. Final Act of the Conference on Security and Cooperation in Europe, Principle 7 and Basket III, § I(b).

7. Conventions of the International Labor Organization, Nos. 111 and 122 (1960 & 1966).

Mr. Shestack will explain the recognized principle in international law permitting an individual to take acts which might otherwise violate national or local laws if those acts are reasonably necessary to prevent serious violations of international laws. Mr. Shestack will also describe the means used by the United States and other countries at the United Nations and other organizations to try to persuade the Soviet government to ameliorate its policy with respect to treatment of Soviet Jews, and he will explain the efficacy, or more accurately the inefficacy, of such efforts.

Defendants may introduce other testimony and exhibits in rebuttal, if necessary.

Respectfully submitted,

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Senator GRASSLEY. Mr. Siegman.

Mr. SIEGMAN. I trust, Mr. Chairman, you will not consider it a violation of your earlier strictures if I inform you—if I take a moment to inform you that earlier this week a small group of senior officers of the American Jewish Congress, the organization I represent, spent 3 intensive days in your State, the State of Iowa, to learn first hand about some of the problems of the State, meeting with its Governor, other public officials, church groups, and farmers groups, and to determine how we can play a constructive and helpful role in addressing some of these problems. It was truly an extraordinary experience for all of us who were there. I regret you were not there with us, but I am glad to have the opportunity to appear before you now.

Senator GRASSLEY. Let me thank you for your interest and for doing that. I know of the humanitarian traditions of your organization, and I know that there will be some help there.

Mr. SIEGMAN. Thank you, Mr. Chairman.

On March 19, 1986, earlier this year, I joined with five other representatives of the American Jewish Congress in an act of civil disobedience on the steps of the Soviet Embassy in this city. All of us who joined in that demonstration have a long history of involvement in the cause of Soviet Jewry.

I personally had the privilege of serving as the director of the predecessor organization to the National Conference on Soviet Jewry, then known as the American Jewish Conference on Soviet Jewry, which organized the first mass demonstration in the Nation's capital on behalf of Soviet Jews in the summer of 1965.

On December 10, 1984, Ted Mann, Theodore Bikel, officers of our organization, and I were arrested following an act of civil disobedience, whose purpose it was to protest the racist policies of the South African Government. While clearly the situation of blacks in South Africa and Jews in the Soviet Union are not identical, it is not the differences but tbe similarities that count. In both situations governments are guilty of repression and the denial of fundamental human rights.

The Jewish community in the United States, no less than our own Government, has followed a dual track policy, as it were, of quiet diplomacy and public pressure. As Anatoly Shcharansky and others have argued, it is only these two activities operating in tandem that can hope to achieve a significant change in the current policies of the Soviet Union with regard to its Jewish citizens and with regard to other human rights violations.

In the closing days of Chernyenko's regime and following the accession of Mikhail Gorbachev to the Kremlin's leadership in early 1985, you will recall that hope ran very high in the American Jewish community and elsewhere that the Soviet Union would relax its pressure on Soviet Jews and open its gates to large scale Jewish emigration.

From a period spanning January to May 1985 I had, together with other colleagues, a series of meetings with a representative of the Soviet Union, a member of the KGB, during the course of which he conveyed the impression that Soviet authorities were on the verge of releasing large numbers of Soviet Jews and in other ways improve their condition in the Soviet Union in return for cer-

tain concessions in the area of trade, leading ultimately to the suspension of the Vanik amendment's provisions.

These discussions, which entailed an examination of specific, graduated steps on both sides, were coordinated closely with the administration and with other major Jewish organizations. As an indication of the seriousness of these discussions, the National Conference on Soviet Jewry at one point issued a formal statement carried as an advertisement in the Washington Post, indicating its readiness to withdraw its opposition to trade with the Soviet Union in return for actual changes in Soviet policy. A parallel signal on the Soviet side was the announcement in Moscow, reported in the New York Times on April 3 and again on April 4, that over 250 Jewish families in Moscow had been asked unexpectedly by local authorities to reapply for exit visas.

Unfortunately, nothing came of this quiet diplomacy. The Kremlin's purpose might well have been to mislead American Jews into believing that the quiet approach was bearing fruit and therefore to lessen the public campaign against the Soviet Union.

The purpose of our demonstration before the Soviet Embassy with the attendent civil disobedience was to declare as dramatically as we could to the Soviet authorities that we are not, in fact, misled, that we have no intention of easing our public pressure in opposition to the Soviet Union's continued repression of Soviet Jews. Because the purpose of our demonstration on March 19 was to condemn Soviet behavior and not the laws of our own country, Mr. Chairman, we engaged in an act of civil disobedience fully prepared to accept arrest and prosecution under our laws.

If the law prohibiting demonstrations within 500 feet of the Embassy is being applied in a discriminatory fashion, we did not believe at the time of our arrest or its immediate aftermath was an appropriate time to make an issue of that, for that would have diverted attention away from where it belongs, the human rights violations of the Soviet Union and also deprived and emptied of all content the act of civil disobedience which we undertook with great seriousness.

It is for this reason that those of us who were arraigned before the Soviet Embassy on March 19 pleaded nolo contendre and did not challenge the Government's prosecution. Of course, our refusal to divert attention from the Soviet Union at the time of our demonstration was not intended, Mr. Chairman, to express indifference to the arbitrary application of our laws if that, in fact, has been the case. Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you. I have the permission of the last witness to let me interrupt this panel and call Judge Sofaer and the district attorney, Joseph diGenova. Judge Sofaer must leave at 3:30, so I will have these two people testify at this point and then ask the first panel to return just as soon as the second panel is done.

Under normal circumstances, our distinguished Government witnesses would testify first, but at my request they agreed to follow our first panel. I thank you for your patience, and I would first introduce Judge Abraham Sofaer, who currently serves as legal advisor to the U.S. Department of State. Judge Sofaer sat on the bench during the Time magazine case in 1984; and then, of course, Joseph

diGenova, U.S. attorney for the District of Columbia with the U.S Department of Justice.

I would ask Judge Sofaer to proceed.

Judge SOFAER. Could I defer to Joe diGenova, since he is the lead on this whole issue?

Senator GRASSLEY. Yes; that is fine. Would you go ahead?

STATEMENT OF A PANEL CONSISTING OF JOSEPH E. diGENOVA, U.S. ATTORNEY FOR THE DISTRICT OF COLUMBIA, U.S. DEPARTMENT OF JUSTICE; AND JUDGE ABRAHAM SOFAER, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. DIGENOVA. Thank you very much, Mr. Chairman. I am delighted to be here and have this opportunity to discuss for you and with you the statute in question, the 22 D.C. code 1115. The statute, its legislative history, and the judicial opinions have uniformly recognized the statute's importance to our foreign policy and to the security of diplomats both here and abroad.

An unbroken line of decisions has consistently upheld the prosecutory judgments made under that statute. For nearly a half a century the U.S. attorney, the U.S. Secret Service, and the Metropolitan Police Department have enforced that statute, which is designed to protect diplomatic personnel in this city and to gain reciprocal protection for our diplomats abroad. The history of that statute is set forth in my testimony in great detail, and I will not belabor that point with the committee, as I am sure you and the staff are quite familiar with it, except to say that it sprang from a deep congressional concern for the protection of foreign diplomats in this country. As a result, Congress enacted into law a statute which it carefully crafted to deal with the specific instances concerning congregating and demonstrating near embassies, which Congress felt would interfere with the conduct of foreign relations and threaten the security of diplomats not only in this country, but of our own diplomats abroad.

Shortly after its adoption, the statute was construed and was upheld, on the basis of its legislative history and the constitutional interpretation of the first amendment, as a quite rational limitation of time, place, and manner of restriction on the exercise of demonstration rights. In each of the cases in which the courts have ruled on the statute, the courts have made it very clear that the concern expressed by Congress was a valid one. It is based on the power conferred in article I of the Constitution, which establishes the power to implement the law of nations through legislation, which may be enacted by Congress and then signed into law.

It is important to note, I think, that the courts have stated that the scope of the statute in providing a specific geographic limitation is important in terms of having upheld its constitutionality over an extended period of time.

In addition, given the days in which we live, unfortunately, the statute has taken on new importance with regard to the concern not only for diplomats here but for our own diplomats abroad.

One judge in a case in 1983 noted that the overriding governmental interests supporting this particular statute have if anything increased and not decreased over the years since it has been first

upheld. Various challenges of various constitutional dimension have been made including equal protection, due process, void for vagueness, seeking to strike it down. All of those have been overridden by each and every one of the courts, both appellate and trial, which have been asked to rule upon the statute in its pristine form. It is, of course, as I indicated earlier, a very well-settled doctrine, that the limitation on matters of expressive activity on public streets and parks is subject to reasonable time, place, and manner regulation, and that, of course, has been the manner in which the courts have construed the law.

Despite the passage of nearly 50 years, the governmental interest articulated in the legislative history remains true today. Indeed, the declarations of senior State Department and Secret Service officials filed in pending litigation demonstrate that, if anything, the interests of the United States are far greater today than they were when the statute was originally adopted.

As I have indicated in my testimony—and I shall not now detail it—the testimony of the Director of the Office of Foreign Missions of the Department of State, Mr. James E. Nolan, forcefully made the point concerning their deep concern about the reciprocity problems with our diplomats in foreign countries and the need to ensure that the statute was enforced.

In addition, the Deputy Assistant Secretary of State for Security, David Fields, indicated that the enforcement of the statute was "important to the foreign policy interests of the United States." Indeed, in noting our treaty obligations, the Deputy Assistant Secretary forcefully expressed the view of the United States that the security both here and abroad is furthered by that enforcement. He observed, relying on recent events, that international crises can create very high emotions and sharp feelings, understandably so, given many of the substantive issues which are involved in some of the demonstrations. And he did in fact cite the taking of hostages at our Embassy in Iran.

On other issues, as he notes, even peaceful demonstrations can become unruly and violent and that the 500-foot rule itself provides a cushion of security which can give law enforcement officials ample time to provide security for diplomats in this city. It is important to understand that Washington, being the seat of government for this country, is a place where for quite proper reasons individuals wish to come and express their views concerning not only the policies of their own government, but the policies of other governments as well.

I will not outline for you in detail the testimony of the former special agent in charge of the Office of Protective Operations of the U.S. Secret Service, Mr. Thomas D. Quinn, except to say that he indicated that the continued enforcement of the statute "is essential if the Secret Service is to provide a minimally acceptable level of security for foreign diplomatic personnel on property located in the District of Columbia."

And, indeed, I might add that this concern is even more compelling, given the fact that this is, of course, the seat of government. Similarly, the testimony of former Deputy Chief John C. Connor of the Metropolitan Police Department echoed his concerns for the continued enforcement of the statute.

It is against this background and congressional purpose that we apply the general principles of prosecutorial discretion, provided for in article II of the U.S. Constitution, on a case-by-case, demonstration-by-demonstration basis. An important consideration in deciding whether to prosecute any case is, of course, the wish of the complaining witness, be it a person or a country.

It is true that this consideration is not necessarily dispositive, nor can it be. It is, however, informative, and it is one of the many factors that a prosecutor must take into consideration in performing his or her duties in deciding whether or not a particular case should proceed.

Indeed, as part of the great breadth of prosecutorial discretion, there are many factors which may be dispositive in a given case, but it is not necessarily the same factor in every case. However, in matters of foreign policy where the need for reciprocity is so compelling, the view of the foreign ambassador can play a major role in determining whether to prosecute.

In this regard, the constitutional duty of the President to conduct our foreign policy is inextricably intertwined with the proper exercise of that prosecutorial discretion. And it is important to emphasize that the reciprocity of which I speak is not a literal reciprocity but rather a reciprocity which deals with the possible array of reciprocal, antagonistic actions which might be taken against U.S. diplomatic personnel abroad.

Accordingly, in our prosecution policy in regard to this statute over the many years on which it has been on the books, the wishes of an ambassador of a country whose embassy was the target of an illegal demonstration have always been taken into consideration.

Reciprocity is the goal of the statute, and because we desire the fair and sympathetic treatment of our embassies, missions, and personnel overseas in return for similar sympathetic treatment of their diplomats and property in our Nation's Capital, we must necessarily consider the view, if expressed, of the foreign government.

This office enforces the laws of the District of Columbia. This particular law of the District of Columbia, as you know, was enacted by Congress, not by the City Council. This office enforces these laws fairly and in a nondiscriminatory fashion. In demonstration cases decisions on whether or not to prosecute are made on a content neutral basis. That is, they are made without regard to our opinion of the particular view expressed or advocated by the demonstrators.

Indeed, in recent months, in addition to rabbis, there have been prosecutions of Ukrainians, Cambodians, opponents of the Soviet invasion of Afghanistan, and a Lutheran minister for demonstrating at the Soviet Embassy. Also, there have been many other prosecutions for illegal demonstrations at other embassies.

Similarly, there have been declinations of prosecution at the Russian Embassy. Indeed, in one case which is now pending in the court of appeals, involving a demonstrator with which you are familiar, a Cambodian demonstrator, the 17 other demonstrators, of which she was a party, were not prosecuted because of their demonstrating at the Russian Embassy, because there was a very severe evidentiary question about whether or not they spoke English and understood the warning to disperse. I allude to that fact

only because it is noted in Judge King's opinion, which is discussed in my testimony, in footnote 25 of his very extensive opinion denying the motion for dismissal on the grounds of selective prosecution.

I should add that notwithstanding the pending case impediment to discussing criminal cases, it would be unwise in any case at any time to discuss the basis for prosecution, since that could undermine the ability of the Executive to enforce the law.

However, we can make exposition of some of the general considerations that govern the decision to prosecute or not in any criminal case. Indeed, these factors were recently addressed by the Supreme Court itself in the *Wayte* case, a significant opinion involving an allegation of unconstitutional selective prosecution of a draft registration evader.

And the Court explained, I think in a very clear way, that our criminal justice system allows the Government broad discretion as to whom to prosecute. So long as the prosecutor has probable cause to believe that the accused committed an offense defined by the statute, the decision whether or not to prosecute and what charge to file or bring before a grand jury generally rests entirely in his discretion.

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis that the courts are competent to undertake.

Further, the wishes of the complaining witness, be it a person or a country, as to whether to prosecute are important, but not necessarily, as I indicated, dispositive considerations. They may play a proper and, indeed, even a major role in the judgment process. There are, of course, other factors appropriate for a prosecutor to consider as well.

I might add in this particular regard that I was appalled when the locally appointed District of Columbia Corporation Counsel, then an individual by the name of Inez Reid, at the time these demonstrations in front of the South African Embassy started, announced publicly through a press release, which is attached to Judge King's opinion, which is part of my testimony that she would not prosecute the demonstrators at the South African Embassy for violating the police line, a charge over which the U.S. attorney has no jurisdiction; and that she would not do so because she agreed with the content of their speech and disagreed with the policies of South Africa.

This unfortunate articulation of a content-based reason not to prosecute was clearly wrong, and, indeed, apparently unconstitutional. I would note that the corporation counsel is an appointee of the District of Columbia city government and is not a Federal employee. The corporation counsel is not answerable to me or to the Department of Justice.

This office has never based its exercise of prosecutorial discretion in any case on such constitutionally impermissible reasons and has

not done so in any of these cases about which the committee is concerned.

[Statement follows:]

PREPARED STATEMENT OF JOSEPH E. DIGENOVA

Mr. Chairman and Members of the Subcommittee:

I am pleased to have this opportunity to discuss prosecutions of violators of 22 D.C. Code §1115, the "500-foot rule." The statute, its legislative history and judicial opinions have uniformly recognized the statute's importance to our foreign policy and to the security of diplomats both here and abroad. An unbroken line of decisions has consistently upheld the prosecutorial judgments made under the statute.

For nearly a half century the United States Attorney, United States Secret Service and the Metropolitan Police Department have enforced D.C. Code §22-1115, a statute designed to protect diplomatic personnel in this city to gain reciprocal protection for our diplomats abroad. 1/

The history of §22-1115 was set forth at some length by United States Court of Appeals for the District of Columbia Circuit in Zaimi v. United States, 476 F.2d 511 (D.C. Cir. 1973). Senator Pittman, the Chairman of the Senate for Foreign Relations

1/ D.C. Code §22-1115 provides:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party or organization, or any officer or officers thereof, or to bring into public disrepute political, social or economic acts, views, or purposes of any foreign government, party or organization, or to intimidate, coerce, harass or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives or any foreign government, within five hundred feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes, except by and in accordance with, a permit issued by the superintendent of police of the said District; or to congregate within five hundred feet of any such building or premises, and refuse to disperse after having being ordered to do so by the police authorities of the said District.

Committee authored the legislation in 1937. See 81 Cong. Rec. 7962 (1937). The basic design of the provision was to protect diplomatic buildings and persons in Washington, D.C. to achieve reciprocal protection for our diplomatic buildings and personnel abroad. 81 Cong. Rec. 8484, 8485. The purpose was to protect diplomats and their families against conduct with the potential for violence. 81 Cong. Rec. 8587. After debating a substitute that would have punished pure speech, the Senate passed with minor alterations the provision of Senator Pittman. 81 Cong. Rec. 8593. With no further changes, the Pittman language became what is now §22-1115 in 1938; see 476 F.2d at 522.

Over the years since its passage §22-1115 has been consistently upheld by the courts in this jurisdiction. An examination of those cases demonstrates the correctness of that view.

Shortly after its adoption, §22-1115 met its first constitutional test. Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939). A number of individuals with signs critical of the German government demonstrated within five hundred feet of the German and Austrian embassies. They challenged their arrest and conviction urging that the statute violated their First Amendment Rights to free speech and assembly. The Court, recognizing the compelling governmental interest in protecting diplomatic personnel, upheld the convictions. 100 F.2d at 693. In the forty-eight years since that decision the courts that have revisited §22-1115 have consistently upheld it against constitutional challenge.

The United States Court of Appeals for the District of Columbia Circuit again had occasion to consider §22-1115 in 1973. Zaimi v. United States, supra. After reviewing §22-1115 the Court concluded that the provision did not reach pure speech unaccompanied by either congregating unlawfully or displaying a banner or placard. Id. at 527. Significantly, in rejecting a vagueness challenge, this Court held that the provision is

"crystal clear" in its prohibitions, and "meticulously specifies" the conduct it governs. Id. at 526.

In 1970 the District Court denied a temporary restraining order against the enforcement of §22-1115. Jews for Urban Justice v. Wilson, 311 F. Supp. 1158 (D.D.C. 1970). The plaintiffs in that action sought to demonstrate against the Soviet Union in front of that country's embassy. The District Court, relying on the Court of Appeals' decision in Frend, declined to enjoin the enforcement of §22-1115. Id. at 1159. The Court observed that the plaintiffs would, in any event, be able to conduct their demonstration five hundred feet away from the embassy. Id. at 1159.

Shortly thereafter a three-judge court examined the constitutionality of §22-1115 again. Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972)(three-judge court). The Court upheld the constitutionality of §22-1115 and 1116 against an equal protection challenge. The Court noted that the governmental interest justifying §22-1115 was paramount and that the provision was limited in geographic scope. Id. at 1301.

The more recent challenges to the constitutionality of §22-1115 have been similarly unsuccessful. In the first challenge Judge Geoffrey N. Alprin denied the motion of two defendants to dismiss charges alleging a violation of §22-1115. United States v. Brown and Faron, Criminal Nos. M-10901-83 M-10902-83 (Superior Court Jan. 20, 1984), (appeal pending). The Court noted that the Supreme Court had acknowledged that a content-based statute could be held constitutional so long as it is "narrowly drawn to accomplish a compelling governmental interest." Slip at 6.

Judge Alprin found an overriding governmental interest supporting §22-1115, observing that "[i]f anything, [§22-1115's] importance had increased, not decreased" over the years since it has been upheld. Slip op. 8, 9. The Superior Court rejected Brown and Faron's argument that §22-1115 violated the equal protection component of the Fifth Amendment. Id. at 10. Relying on the District Court's decision in Jewish Defense League, supra, Judge

Alprin found that the "paramount overriding governmental interest" supporting the statute distinguished it from other cases. Slip op. at 10. The Court also rejected the other arguments advanced by the defendants.

The law is well established. As a general matter expressive activity on public streets and parks is subject to reasonable time, place, and matter regulation. United States v. Grace, 103 S. Ct. 1702, 1707 (1983); Perry Education Ass'n v. Perry Local Educator's Ass'n, 103 S. Ct. 948, 955 (1983); Haffron v. Int'l Soc. of Krishna Conc., 452 U.S. 640, 647 (1981). Additional restrictions, even reaching so far as an absolute ban on certain expression are constitutional so long as they are narrowly drawn to accomplish a compelling governmental interest." Grace, 103 S. Ct. at 1707; Perry Education Ass'n, 103 S. Ct. 955.

The more rigorous standard of review comes into play when the government makes its regulatory decision based upon the content of the speech. Widmar v. Vincent, 454 U.S. 263, 269-270 (1981). The Supreme Court held

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the university must therefore satisfy the standard of review appropriate to content based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

Id. (citation omitted).

Despite the passage of nearly fifty years the governmental interest articulated in the legislative history remains true today. Indeed, the declarations of senior State Department and Secret Service officials filed in pending litigation demonstrate that, if anything, the interests of the United States are greater today than in 1937 when §22-1115 was proposed.

The Director of the office of Foreign Missions of the Department of State James E. Nolan, Jr., forcefully stated that continued enforcement of §22-1115 advanced the policy interests of the United States government and the effective operation of

the Office of Foreign Missions. Just as Congress deemed it important to the protection of our own diplomats abroad when the provision was first adopted, Director Nolan announced that continued enforcement of §22-1115 is important to the safety and protection of our personnel overseas. He noted that often our conduct in the United States has a direct impact on the protection afforded our missions and personnel abroad. Id. Director Nolan expressed the State Department's view strongly opposing any limitation on the enforcement of §22-1115; the potential for injury to our people abroad because of a reduced degree of security there is a real possibility. Id.

Deputy Assistant Secretary of State for Security David Fields stated that continued enforcement of §22-1115 is "important to the foreign policy interests of the United States." Noting our treaty obligations, Deputy Assistant Secretary Fields forcefully expressed the view of the United States that the security both here and abroad is furthered by enforcement of §22-1115. He observed, relying on recent events, that international crises can create high emotions and sharp feelings, citing the taking of hostages at our embassy in Iran.

On such issues, as he notes, even peaceful demonstrations can become unruly and violent. He explained another recent situation in which enforcement of §22-1115 provided a crucial link in the security protecting foreign diplomats:

> Another example of this problem occurred recently in connection with a demonstration near the Soviet Embassy by a group of Afghans protesting the Soviet invasion of Afghanistan. The demonstrators broke through police lines, but due to the five hundred foot distance separating them from the embassy premises, police were able to reestablish control, making a number of arrests in the process, before the demonstrators could reach the building. Had the distance separating the demonstrators from the Embassy been less, the results probably would have been quite different, and property damage and personal injury to the Embassy and its occupants might well have resulted, with potentially serious consequences for U.S. foreign relations and the security of U.S. personnel overseas.

Mr. Fields articulated another strong view that, just as when it was originally adopted, continued enforcement of §1115 is important to the present maintenance of security of diplomatic personnel and our foreign policy.

Former Special Agent in Charge of the Office of Protective Operations of the United States Secret Service Thomas D. Quinn is responsible for coordinating the activities of the United States Secret Service Uniformed Division which include protection of foreign diplomatic missions in Washington, D.C., as well as protection of the White House and other buildings where there are Presidential offices. He compared the protection of the White House with the Secret Service responsibilities over foreign diplomatic buildings. Although the Secret Service is, of course, able to maintain a presence in the White House, the Secret Service may not enter the premises of foreign diplomatic buildings unless specifically invited. Thus, in the view of the Secret Service, the continued enforcement of §22-1115 "is essential if the Secret Service is to be able to provide a minimally acceptable level of security for foreign diplomatic personnel on property located in the District of Columbia." Special agent Quinn noted in his affidavit that the District of Columbia is a national capital with a significant number of embassies, and a higher visibility of diplomatic activity takes place. He characterizes §22-1115 as a key element to enable Secret Service to perform its protective function for foreign embassies successfully. He expressed the view of the Secret Service that "any diminution of 22 D.C. Code §1115 is untenable in view of the very real threat to human life that would result."

The views of former Deputy Chief John C. Connor of the Metropolitan Police Department were similar. In his view §22-1115 is necessary to afford appropriate protection to embassies and diplomatic buildings especially because a number of them are located in a fairly confined area of ten to fifteen city blocks. Based on his years of experience including nearly four years of

direct experience as Commander of the Special Operations Division, Deputy Chief Connor expressed his professional judgment that §22-1115 is a necessary police tool, and its continued enforcement is necessary to maintain appropriate protection of diplomatic buildings.

It is against this background and purpose that we apply the general principles of prosecutorial discretion on a case-by-case, demonstration-by-demonstration basis. An important consideration in deciding whether to prosecute any case is the wish of the complaining witness, be it a person or a country. It is true that this consideration may not always be dispositive. Indeed, as a part of the great breadth of prosecutorial discretion there are many factors which may be dispositive in a given case. However, in matters of foreign policy where the need for reciprocity is so compelling, the view of the foreign ambassador can play a major role in determining whether to prosecute. In this regard, the constitutional duty of the President to conduct our foreign policy is inextricably intertwined with the proper exercise of prosecutorial discretion.

Accordingly, in our prosecution policy in regard to 22 D.C. Code § 1115, we have, over the years, considered the wishes of the Ambassador of the country whose embassy was the target of the illegal demonstration. Reciprocity is the goal of § 1115. Because we desire fair and sympathetic treatment of our diplomatic embassies, missions and personnel overseas, in return for similar, sympathetic treatment of their diplomats and property in our nation's capital, we must necessarily consider the view, if expressed, of the foreign government.

This office enforces laws in the District of Columbia fairly and in a non-discriminatory fashion. In demonstration cases, decisions on whether or not to prosecute are made on a "content-neutral" basis; that is, they are made without regard to our opinion of the particular view advocated by the demonstrators Indeed, in recent months, in addition to Rabbis, there have been

prosecutions of Ukranians, Cambodians, opponents of the Soviet invasion of Afghanistan, and a Lutheran minister for demonstrating at the Soviet Embassy. Also, there have been many other prosecutions for illegal demonstrations at other embassies. For example, over the years, there have been prosecutions of demonstrators at the German, Iranian, Chinese, and other embassies.

I should add that, notwithstanding the "pending case" impediment to discussing criminal cases, it would be unwise in any case at any time to discuss the basis for prosecution since that could undermine the ability of the executive to enforce the law, because it would give important information to would-be violators. (See, Wayte v. United States, 105 S. Ct. 1524, 1531-1532) (1985). Such a discussion would clearly not be in the public interest.

However, we can make exposition of some of the general considerations that govern the decision to prosecute, or not, in any criminal case. Indeed, these factors were recently addressed by the Supreme Court quite aptly in the Wayte case, a significant opinion involving an allegation of unconstitutional selective prosecution of a draft-registration evader. The Wayte Court explained:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. United States v. Goodwin, 457 U.S. 368, 380. n. 11 (1982); accord, Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. U.S. 357, 364 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover. entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and

> decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Id. 105 S. Ct. 1531-32 (emphasis added)

Further, the wishes of a complaining witness, be it a person or country, as to whether to prosecute are important, although they are not necessarily dispositive considerations. Of course, when foreign policy considerations are involved in a case, they may play a proper and major role in the judgment process. There are, of course, other factors appropriate for a prosecutor, as law enforcer, to consider of which the members are no doubt aware due to their service on the Judiciary Committee.

The Department of Justice enforces laws in the District of Columbia and throughout the United States fairly and in a non-discriminatory fashion. More particularly, in demonstration cases, each prosecutive decision is "content-neutral"; that is, the content of the speech of an individual or group of demonstrators cannot affect the decision of whether to prosecute. Indeed, to allow it to do so would be constitutionally impermissible.

I was, therefore, appalled when the locally-appointed D.C. Corporation Counsel, then Inez Reid, announced that she would not prosecute demonstrators at the South African Embassy for violating the police line (a charge over which the United States Attorney has no jurisdiction), and not do so because she agreed with the content of their speech and disagreed with the policies South Africa. This unfortunate articulation of a content-based reason not to prosecute was clearly wrong, indeed, apparently unconstitutional. I would note that Ms. Reid is an appointee of the District of Columbia city government and is not a federal employee. She is not answerable to me or to the Department of Justice. This office has never based its exercise of prosecutorial discretion in any case on such constitutionally impermissible reasons.

The fact that the United States Attorney for the District of Columbia is prosecuting some violators of § 1115 but not others does not support a claim of arbitrary or discriminatory prosecution. The Soviet/South African situations are not at all legally identical. From information that is a matter of public record, it is clear that the demonstrations occurred at two different locations in the Nation's Capital, involved different demonstrators, and, most pertinently, different embassies, and different countries.

"Selective prosecution" as it is called, exists at law only when because of improper motive, an individual or individuals are singled out for prosecution among those "similarly situated." Those arrested at the Soviet Embassy are "similarly situated" to other protestors arrested at the Soviet Embassy and not to those at the South African Embassy. The relationship of the United States to each country with which it has diplomatic relations is a unique one. Consequently, attempts to fuse separate incidents at separate embassies into one situation for purposes of alleging unconstitutionally discriminatory treatment must, by both law and logic, fail.

If the situation is "identical" to anything, it is to the status of the Cambodians, Ukranians, opponents of the Soviet invasion of the government of of Afghanistan and others who have demonstrated at the Soviet Embassy and been prosecuted within recent months by the United States Attorney for the District of Columbia. Also, there have been many other prosecutions for illegal demonstrations at other embassies.

Perhaps the most dramatic evidence of the lack of any improper selective prosecution in these cases is the judicial scorecard. One hundred forty-four defendants were charged in 1985 with violating §1115 near the Soviet Embassy. Of those, one hundred forty-one have proceeded to disposition by trial or plea. Because of fugitivity or other problems three remain to be adjudicated. In every case in which the defendants mounted an

attack on the statute, or challenged the prosecutions, as impermissibly selective, the challenge to the decision to prosecute and to the constitutionality of the statute has been rejected--every single case.

There is one concern that has been recently raised about reciprocal handling of demonstrations near our Embassy in the Soviet Union. Newspaper stories in April reported that there have been recent demonstrations near our Embassy in Moscow. Upon reading those accounts, members of my office consulted with States Department officials about the reports. This office was assured that, with but one minor exception, the Soviet officials have ensured that the demonstrators have maintained the proper distance from our Embassy. The State Department has assured us that there has been no breakdown of reciprocity in the handling of demonstrations near our Embassy in the Soviet Union.

One final point should be made regarding the potential role of foreign policy in the discharge of the duty of prosecutorial discretion. By recent agreement between Prime Minister Thatcher of Great Britain and President Reagan, the United States Department of Justice criminal investigation of airline ticket price-fixing involving a British Company was cancelled. That judgment, made on foreign policy grounds, had the effect of halting a grand jury investigation.

Thus, while our foreign policy is only one of a number of factors that this office may have a duty to consider in dealing whether to prosecute in an individual case, it can be a most important one.

I will be happy to answer your questions.

Senator GRASSLEY. I will have to break in here so we can go vote.

Mr. DIGENOVA. That is fine, Mr. Chairman. Thank you very much. I appreciate your attention.

Senator GRASSLEY. Senator Heflin is here, and I thank him for his support and I welcome him. Also, Judge Sofaer, I know that you have to go at a certain time. I believe that is 3:30. I respect that very much. I hope I get back to hear your testimony. Obviously, I will not be able to ask any questions.

Judge SOFAER. I will stretch it out for a few minutes, Senator, but I have to be on a plane, as you know.

Senator GRASSLEY. Yes. Let me just say that I will respect when you have to just get up and leave. But stay as long as you can.

Mr. DIGENOVA. Thank you, Mr. Chairman. I appreciate your attention very much.

[Brief recess.]

Senator GRASSLEY. Judge Sofaer, would you proceed.

Judge SOFAER. Senator, you are about to witness the shortest oral presentation perhaps in your experience. I have a written statement which I hope you will include for the record. I came into the department last year and I looked into this matter because it was something that meant a lot to me; both the subject matter that you are looking into, the people involved are all people and issues that concern me personally.

I was also directed to look into it by the Secretary because he was concerned of the appearance that some people saw of an inappropriate or unfair enforcement system. After a very thorough look at the issue, I am completely convinced that the statute here is being enforced for good reasons and in a fair manner.

The statute serves our obligation to protect these embassies and the protection of the embassies is not just a legal obligation, but one that gives us reciprocity or reciprocal protection overseas.

I believe that the U.S. attorney in this district, perhaps not other law enforcement officials, by our U.S. attorney, Mr. diGenova, is applying the statute in a fair and even in a humane manner with great sensitivity about the issues that he has to face every day.

Finally, I would say that I applaud you, Senator Grassley, for giving this matter as much concern as you have given it because it is a sensitive and difficult matter, and beneath it lie consideration and concerns that I can tell you with confidence are shared by the very law enforcement officials and Department of State officials that are before you today as witnesses. We feel strongly that our role should not be the focus of criticism here, but the lack of freedom in those States that cause people to feel strongly enough to violate the law, even in a symbolic sense; those are the proper objects of criticism and concern, in my judgment. Thank you, Senator.

[Statement follows:]

Prepared Statement of Abraham D. Sofaer

Mr. Chairman and Members of the Committee:

It is a pleasure to appear before you today to address the issue of prosecution of demonstrators in the District of Columbia for violations of the so-called "500-foot rule," 22 D.C. Code § 1115. Congress enacted this statute in 1938. Among other things, the statute provides that: "It shall be unlawful . . . to congregate within 500 feet of any such building or premises [housing a foreign embassy, legation, consulate, or other official foreign facility], and refuse to disperse after having been ordered to do so by the police authorities of the said district."

The ultimate decision whether or not to prosecute demonstrators for violations of the "500-foot rule" is made by the United States Attorney and the Department of Justice. Naturally, such decisions take into account our obligation to provide adequate security protection to foreign missions in this country and our desire that foreign governments provide such security to our missions abroad.

In recent months, some have criticized the U.S. Attorney for engaging in "selective prosecution" of demonstrators who violate this statute. Critics have objected that it is unfair to prosecute demonstrators who violate the 500-foot rule at some embassies, but not those who violate it at others. Foreign governments, the criticism continues, should not be the ones to decide which persons will or will not be prosecuted for breaking U.S. law.

The Government is at something of a disadvantage in responding to these criticisms. As a matter of longstanding -- and sound -- policy, the Justice Department does not articulate the bases for its decision whether or not to prosecute in a

particular case. The most that the Government can do is to explain, in general terms, some of the factors that influence its exercise of prosecutorial discretion. In fact, two entirely appropriate principles support the U.S. Attorney's decisions with respect to the 500-foot rule.

First, enforcement of this statute serves important governmental interests. The United States Government is obligated to protect diplomatic missions located in this country. The Vienna Convention on Diplomatic Relations provides that:

> "The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." (Art. 21)

Congress made the judgment in 1938 that a 500-foot cushion is necessary to provide adequate security for diplomatic offices. The threat of terrorist violence has increased the need for such protection in recent years. Courts have recognized that the the 500-foot rule is in furtherance of the United States' obligation under international law to protect foreign governments and their representatives from the types of actions listed in that statute. (See, e.g., Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300, 1302 (D.D.C. 1972).)

The protection of diplomatic missions and their personnel in the United States is more than just a legal obligation: it is also in our nation's self-interest. The security of our missions and personnel abroad has attracted great public attention. Only by providing adequate protection here can we expect other nations to protect U.S. facilities in their countries. U.S. refusal or failure to enforce the statute with

respect to a given nation's embassy might well lead that nation to decide not to provide adequate protection for our missions there or even provoke it into taking retaliatory measures against our offices in its country. Considerations of reciprocity are a critical element underlying this statute.

A second guiding principle, with respect to this statute as well as criminal laws generally, is that the wishes of the "victim" are highly relevant in deciding whether or not to prosecute. When a nation whose embassy is protected by the statute does not wish to see violators prosecuted, it makes little sense to expend prosecutorial and judicial resources to try the case, unless we have our own reasons for doing so. In such cases, non-prosecution does not give rise to the risk of retaliatory action by the other government, because that State has voluntarily waived the statutory protection. Indeed, pressing forward with a prosecution ove the objections of the foreign government might adversely affect our relations with that nation.

I wish to emphasize, however, that taking into account the wishes of the foreign government is not the same as turning the prosecutorial decision over to it. Although a particular embassy's wishes are relevant to the overall question of prosecuting violations of the 500-foot rule at that site, foreign governments have no control over prosecution decisions. We might in some instances choose to proceed with prosecution, even if the embassy involved preferred to see the charges dismissed, if we determined that prosecution was necessary to maintain adequate security at the facility or to serve other law enforcement objectives.

It is unfortunate that prosecuting demonstrators at some embassies but not at others strikes some people as discriminatory or unfair. But where the respective prosecution

decisions reflect the wishes of the embassies involved, the distinction is wholly proper. The alternatives that would satisfy demands for uniform prosecutions are far less desirable. One alternative is to prosecute all demonstrators who violate the 500-foot rule, even when the embassy involved declines to press charges. Such a policy would represent an inefficient use of prosecutorial and judicial resources and would needlessly restrict First Amendment-related activity. It could also lead to friction with a foreign State that preferred not to see individuals prosecuted for coming too close to their property.

The other alternative is to prosecute no demonstrator who violates the statute at any facility, even when a particular embassy insists upon full enforcement of the law. This alternative would be tantamount to de facto repeal of the statute. It could constitute a breach of our obligations under international law. It could well lead other nations to take retaliatory measures against U.S. facilities and result in diminished security for our personnel abroad. Given the targetting of U.S. sites abroad by terrorists, we cannot afford this risk.

I wish to emphasize, in closing, that the 500-foot rule is more important now than ever before. It has served its purposes well, and it has been applied by our U.S. Attorney with sensitivity and care in each particular situation. On the other hand, we should no more disregard the desires of foreign States, as property owners, then we do the desires of other property owners. Absent a breach of the peace or other public danger, a prosecutor is on sound, traditional ground in accepting an owner's desire not to prosecute. For these reasons, therefore, no change in enforcement policy is warranted.

Senator GRASSLEY. I would like to make some comments and then ask for your comment. Let me draw attention to two statutes, one in the D.C. Code, one in the U.S. Code, one relating to missions outside Washington, DC, and then the one that we are talking about here that involves the 500-foot limit.

Judge, in your testimony you did quote the statute under which the people like the ones who were on the first panel have been prosecuted. You state that our Government is obligated to protect diplomatic missions located in this country, and that it is this statute that enables us to provide the necessary protection. Then obviously considering 18 U.S.C. 112, which governs the protection of diplomatic facilities outside of Washington, DC, in your opinion, if that code section applied to the District of Columbia, would these people have been in violation of the law?

Then let me go on to point out before you answer—what I am trying to get at is this: We are trying to protect diplomatic facilities from harm. That is the way I understand the statute. We have determined that demonstrations within 100 feet of other facilities outside of Washington, as long as there is no imminent danger or threat to diplomatic personnel, is permissible. If the purpose behind the law is protection of the facilities, why does one facility deserve more protection than the other? In a very real sense then, would that not cause us to look at whether or not the 500-foot rule is really a justified rule.

Judge SOFAER. I will answer briefly and turn it over to Mr. diGenova. I think you are right, Senator; it is Congress that has to decide what the law should be in various jurisdictions. You have told us and you have told Joe that there is a 500-foot rule in the District of Columbia and that is what he is applying.

You have told the U.S. Department of Justice that there is a 100-foot rule outside the District of Columbia and that is the rule that they would apply. Now, I would say, though, that if something dangerous happened beyond 100 feet, some grave threat or something, I would imagine that they would act. But there is a difference in the rule and it is for you——.

Senator GRASSLEY. Well, let me make clear that I feel here in two positions: one is oversight, one too see if the law is adequate: What is your judgment? Would the administration—how would it feel about the 100-foot rule for Washington, DC?

Judge SOFAER. I would like to go back and speak to my principals about it, but we will give you an answer for the record if you wish, Senator. Maybe Mr. diGenova has given some more thought to it.

Mr. DIGENOVA. Well, Mr. Chairman, I echo Judge Sofaer's comments about the genesis of the statute. Both of them are, of course, under our system, congressionally enacted. They are the ideas and the thoughts of Congress after having sought the views of the executive branch. As to the 500-foot rule, my reading of the legislative history and the reason for the difference between Washington and the rest of the country was that given that this was the seat of Government, given that there were more foreign missions, embassies, and attachments here than anyplace else, given the limited 67-square-mile area of the District of Columbia, and given the fact that more diplomats are likely to come and be here at any given time, that the buffer zone, the increased 400 feet was necessary, in

view of the constricted geographical confines in which the Embassy situation exists here.

However, I would again agree with the judge; I will be delighted to transmit to my superiors the notion which you have suggested and provide something for the record on that score.

Senator GRASSLEY. I feel that the statute is somewhat outdated, but as long as protection is our purpose, protection of the facilities and in some instances, you know, you can go beyond the 100 feet in the case of danger to personnel; but if that is our purpose, should not our citizens be allowed to exercise the first amendment rights to the greatest extent possible? We almost look at it as no infringement whatsoever. I would say this: As a practical matter, it is very difficult to redress grievances if you are 500 feet away trying to tell a country, indirectly through their embassy personnel here, that we disagree with your policies, whether it is South Africa or whether it is Russia.

I would go so far as to say that even without the specific statute saying 500 feet for D.C. or 100 feet for elsewhere in the United States, that there are adequate laws against trespass, assault, battery, and a variety of others that would adequately protect personnel as well as facilities.

Judge SOFAER. Well, that is not the judgment of Congress at this point, Senator, and it is our duty to abide by the judgment of Congress. In so far as the State Department is concerned, we certainly would seek and want a buffer zone overseas for many of our facilities. We are in a situation now where we are worried about security, and we do need some degree of protection. Also, there is the issue of ingress and egress, free ingress and egress and the potential problem of noise that might interfere with operations.

But I agree that so long as all the necessary elements of an operating diplomatic facility are satisfied and protected, the statute should be as narrowly drawn as possible.

Senator GRASSLEY. Well, let us continue to look at the issue of protection because that seems to be our major purpose. If the Congress is going to reexamine this statute and in order to draft appropriate legislation we need information on what kind of conduct these embassies need protection from.

It also seems to me that if the U.S. Attorney's Office exercised its discretion in a uniform manner, maybe we would not be forced into a legislative solution. It is my understanding that when these demonstrations take place there is some singing, some reading from the Bible, and some statements read on behalf of human rights activists. Is this not essentially the conduct that we have seen in these demonstrations? Is my understanding correct on that? Then I want to go on.

Judge SOFAER. I am going to excuse myself.

Senator GRASSLEY. I understand. Thank you very much.

Judge SOFAER. Thank you for your understanding.

Senator GRASSLEY. Yes, I do, you may get some questions in writing.

Judge SOFAER. That was a very good question. I am happy to leave it to Mr. diGenova to answer.

Senator GRASSLEY. That is basically what goes on. Could you just say yes unless I am way off base.

Mr. DIGENOVA. Mr. Chairman, many things go on during these demonstrations. That is part of what goes on. I would not dispute that. It is not the entirety of what goes on, but it is certainly part of what goes on. And all I would say is that the manner in which Congress has drafted the statute includes that kind of conduct in the conduct that it has sought to be enforced under the statute. And the courts have so ruled.

Senator GRASSLEY. In other words, stopping those basic expressions of freedom of speech.

Mr. DIGENOVA. That is correct, Mr. Chairman.

Senator GRASSLEY. But it seems to me that these expressions are perfectly consistent with the exercise of free speech under the Constitution. It is difficult for me to understand how foreign missions need protection from this type of display. You said it is more than that, but let us just say it is limited to that. What does that have to do with protection?

Mr. DIGENOVA. Mr. Chairman, I suppose that that is a question which is better asked of your colleagues who drafted that legislation and asked us to enforce it, except to say that it is clear that Congress has intended congregating within 500 feet of an embassy and then refusing to disperse when asked to do so, or doing any act or carrying banners, placards, or objects which bring into disrepute or concern the foreign government, that is the enforcement mechanism which Congress has established.

If it chooses to change that, obviously it has every right in the world to do so. I cannot get inside the heads of individuals and speak for other governments at this point. I think the State Department is probably better able to do that than I am because they are the ones who communicate with the countries when these things occur and then transmit it to us. But it obviously is of concern.

Senator GRASSLEY. Let me ask you, do the foreign missions in San Francisco need less protection from this type of peaceful activity than the embassies in the District of Columbia? Is the South African Embassy entitled to less protection than the Soviet Embassy in the District?

Mr. DIGENOVA. Well, Mr. Chairman, with regard to the differences between San Francisco and Washington, Congress had made that distinction by putting in the two different areas, the distances around the embassies. With regard to the differences between here and the Soviet Union and the South African Embassy——

Senator GRASSLEY. Could I have your opinion on this. I know that you are saying what the law is, but I am asking for your opinion.

Mr. DIGENOVA. Mr. Chairman, I am not in a position to render such an opinion. It is not within the confines of my responsibilities.

Senator GRASSLEY. We are talking about protection, but I guess that if you take your argument to its logical conclusion, then there is more than protection involved.

If this is the case, what type of retaliatory effects are we trying to protect ourselves from? If we prosecuted the South African demonstrators, would we fear that the South African Government would not protect our Embassy, as an example? Would we be fearful that they would cut-off trade?

Mr. DIGENOVA. Mr. Chairman, that is certainly not within my expertise. I would suggest that the Commerce Department or the State Department could answer that. The statute as drafted and its legislative history indicates that reciprocity was a vital concern and, indeed, the undergirding of Congress's reason for acting. I really cannot quantify what that is. I think the Department probably could, however. The State Department may be able to outline it.

Senator GRASSLEY. The stated reason for the prosecution, though, is reciprocity.

Mr. DIGENOVA. That is correct. To achieve, according to the testimony of various officials who have testified, a reciprocal grant of protection to our Embassy personnel abroad.

Now, as I indicated earlier in my testimony, that reciprocity is not, as I have understood it, is not a literal reciprocity, but rather one to protect against various types of reprisals which might occur, both subtle and not so subtle in friendly and not so friendly countries, which may take various forms, from physical violence to harrassments of various types with which we are all familiar from our common reading of publicly available documents.

Senator GRASSLEY. What is the law enforcement objective, then, that we are trying to obtain by the prosecution of people outside the Soviet Embassy?

Mr. DIGENOVA. Well, Mr. Chairman, the legislative history which Congress has devolved upon me as a law enforcement official is that in those instances in which discretion is exercised to go forward, the purpose is to ensure the safety and the free access and egress of those facilities by the diplomatic personnel and to ensure that those Embassy individuals are free to go about their business. As I indicated earlier in my testimony, we take our victims as we find them. We do not find it pleasant or consoling to have to deal with certain types of victims or witnesses.

I do it in drug cases when I have to deal with drug dealers who testify for the Government. It is no less consoling to have to deal with certain governments, but that is my responsibility.

Senator GRASSLEY. Have these demonstrations stopped people coming and going from the Soviet Embassy in any way?

Mr. DIGENOVA. They have in some instances, Mr. Chairman, but I do not believe that that has been the major impact on any of these Embassies, the egress, the going and coming.

Senator GRASSLEY. I would like to turn to the issue then that you are really addressing and that is the prosecutorial discretion.

Mr. DIGENOVA. Yes, Mr. Chairman.

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Senator GRASSLEY. And how the decision to prosecute is made. Now, I understand that the Department has some reluctance to discuss its reasons for prosecuting or not prosecuting, but in this matter we have very serious policy questions. As a matter of public policy, similarly situated citizens should be treated in a similar manner. It is difficult for me to distinguish between these two groups of people; people before the Soviet Embassy and people before the South African Embassy. And I notice that your statement contains the phrase "prosecutorial discretion" in several different places as if the mere repeating of that phrase foreclosed all inquiry into your decisions.

While prosecutors have latitude in deciding whom to prosecute, a line of Supreme Court cases over the last 100 years has held that this discretion is not unfettered. The Supreme Court recently stated in that case that "the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, including the exercise of protected statutory and constitutional rights."

Clearly, the decision to prosecute cannot be based on political views espoused by the defendant; would you agree?

Mr. DIGENOVA. That is correct, Mr. Chairman.

Senator GRASSLEY. I wonder if you would agree that deciding to prosecute a case based on political accommodation or convenience of a foreign government could also be such, according to the decision, arbitrary classification?

Mr. DIGENOVA. Well, Mr. Chairman, the answer to that question is that in taking into consideration all of the factors that any prosecutor does in any case, such as the weight of the evidence, the availability of the witnesses, the desire of the victim to prosecute, the spending of resources, the limitation on the number of cases that you may bring at any given time, the physical health of a particular defendant; as I indicated, earlier, for example——

Senator GRASSLEY. Is all of that in relationship to the protection of the Embassy?

Mr. DIGENOVA. No; the protection of the Embassy is one other factor. If you add that to that list, which you would add because of this particular statute you would find one other factor in addition to all those other ones that I indicated. It is one of the other factors; it is not dispositive, but certainly an informative factor would be the views of the Government to which this country plays host.

Senator GRASSLEY. And then in that latter case brings up the reciprocity argument. And we have had so much emphasis upon the protection issue and the reciprocity issue. Are we concerned about protecting our foreign missions from the same kind of conduct that is occurring outside missions in this country?

Mr. DIGENOVA. That is certainly one of the things about which the State Department has informed the Justice Department that they are concerned about and historically has informed the Department that that is what they are concerned about.

Senator GRASSLEY. Then in that regard, these seem to me to be very peaceful protests. And it seems to me that as Americans we can never find this kind of conduct abhorrent.

Mr. DIGENOVA. Mr. Chairman, the only way that I can respond to that is this: Congress, when it crafted this statute and the other

one which applies in the 50 States, decided that it wanted this conduct prohibited within the certain geographical limitations outlined by the statute. It is within Congress' power to change this statute, to either limit it or abolish that restriction.

Senator GRASSLEY. I have to admit to you that when you say if that is your reading of the congressional statute it is a problem for us, but that is why we are here. That is why I am here.

Mr. DIGENOVA. Mr. Chairman, let me say, I want to echo what Judge Sofaer said, which is that I applaud your desire and your willingness to look at the statute in its pristine form and to make a decision about whether or not you think, and perhaps other Members of Congress think, that it is an appropriate vehicle. It is the position and has been for many years of the Justice Department and the State Department that it is a necessary vehicle for the protection not only of diplomats in this country but for diplomats abroad.

Because of the Vienna Convention and the various treaties to which we are signatory which require us to enact legislation, pursuant to the law of nations section of article I, these statutes have been enacted by Congress pursuant to that constitutional authority and according to the international treaties to which we are signatory. It is the position of the Justice Department and the State Department that such statutes are necessary, that they are vitally necessary for the reasons Judge Sofaer so ably outlined.

It is also perfectly proper for Congress to consider the wisdom of that judgment.

Senator GRASSLEY. But to come back to a very important question, you find it necessary to prosecute in one case and not in the other.

Mr. DIGENOVA. Mr. Chairman, as I indicated earlier, there are dozens of reasons to proceed or not to proceed in given cases. Let me explain, if I might, by referring to a footnote in Judge King's opinion in the case which I mentioned to earlier. I think this is quite interesting. In Judge King's opinion, which is a part of the record, he notes that the 17 other adults who were present at the Russian Embassy—and this is a matter of public record—all 17 were apparently native Cambodians. They were arrested with the defendant but not formally charged. I underscore, they were not formally charged.

That meant that 17 of the individuals on this particular day in front of the Russian Embassy were not formally charged. The judge went on: "The defendant conceded at the hearing on these motions that there were legitimate reasons for not prosecuting the other 17 arrestees."

Senator GRASSLEY. Tell me the relevancy.

Mr. DIGENOVA. Well, I am addressing to your point about the question of why you proceed in one instance and not in another. What I am saying is that even in front of the Russian Embassy, where there have been prosecutions, not everyone who has been arrested in front of the Russian Embassy has been prosecuted. And as an illustration of that, I am citing a public record document, which is Judge King saying that in this instance the reason that the 17 other codefendants were not prosecuted was because they

could not speak English and could not understand the order to disperse from the Secret Service officer.

This is an example of a reason not to prosecute which, by the way, is derived from a constitutionally binding principle that it would be improper for me to go forward in that case knowing that a defendant could not have committed the crime because the defendant could not understand one of the elements of the crime, which was the order to disperse.

Senator GRASSLEY. If you are looking for a basis for reciprocity, do you see the situation different in the Soviet Union than in South Africa based upon reciprocity? See no such difference.

Mr. DIGENOVA. Mr. Chairman, I do not have anything to do with the foreign policy considerations involved in these cases. That is a judgment which is made by the State Department. I never analyze what the foreign policy of our country is with regard to individual countries.

Senator GRASSLEY. Does that not have to be an integral part of your decision to prosecute or not?

Mr. DIGENOVA. No, not at all, Mr. Chairman. It is the communication between the government of that country and our State Department that is communicated to me, not the substance of our foreign policy.

Senator GRASSLEY. Then when you sit in that vacuum and make that decision to prosecute or not to prosecute, what is the basis then?

Mr. DIGENOVA. Well, Mr. Chairman, it is not a vacuum, first of all. It is a highly informed environment.

Senator GRASSLEY. Well, at least a vacuum from the standpoint of the State Department not sitting there with you.

Mr. DIGENOVA. Well, Mr. Chairman, certainly there is a communication. We are informed of the——.

Senator GRASSLEY. Do they tell you to prosecute?

Mr. DIGENOVA. No, no one instructs us or orders us or directs the prosecution. We are informed of the position of the government whose Embassy has been demonstrated in front of, and that fact, that information is passed along to us. It is then used in the entire fact pattern as one element and one element only to determine whether or not to go forward.

As I indicated earlier, the position of the foreign government is not dispositive; it is only informative.

Senator GRASSLEY. I would like to speak on that point you made. You seem to indicate that while the South African Government desires nonprosecution, the Soviet Government is insisting on prosecution. My staff discussed this issue with the South African Embassy personnel, the Deputy Chief of Missions, Andre Killian, just this week, and according to Mr. Killian, while it is true that the Embassy did not press charges back in 1985 against those demonstrators who actually trespass against the Embassy, they have had no communication with you regarding the more recent demonstrations which take place outside the Embassy.

According to Mr. Killian, the Embassy feels that the demonstrators have violated a District law and it is up to the U.S. attorney to make a judgment without the Embassy's interference.

From this information, I gather that noncommunication from the Embassy is a major factor in the U.S. attorney's decision not to prosecute. On the other hand, you must have received communication from the Soviet Embassy that they desired prosecution. I find as a policy matter, considering how they treat anyone who dissents in their country, meaning the Soviet Union, that we would give weight to their desires to prosecute our citizens for exercising their constitutional rights and I find that very incredible. And I would ask you to comment or maybe you care not to comment.

Mr. DIGENOVA. I really do not have anything to say about that, Mr. Chairman.

Senator GRASSLEY. Have the Soviets communicated with you?

Mr. DIGENOVA. They have communicated with the State Department, Mr. Chairman, and that information has been communicated to me.

Senator GRASSLEY. In writing?

Mr. DIGENOVA. I have no idea.

Senator GRASSLEY. Then could I have a confirmation of that communication, whether it has been in writing or otherwise?

Mr. DIGENOVA. I will be happy to arrange that for the chairman.

Senator GRASSLEY. Thank you.

Mr. DIGENOVA. Absolutely.

Senator GRASSLEY. If indeed the South African Embassy has waived its right to protection in these instances, how has that been done? What communication has taken place there?

Mr. DIGENOVA. Mr. Chairman, they have communicated with the State Department early on indicating, it is my understanding, expressing their concern about none of the cases being prosecuted at any time, and that has been an ongoing expression.

Senator GRASSLEY. Now, that does not square with our information, is that the best information you have?

Mr. DIGENOVA. Yes, sir, absolutely.

Senator GRASSLEY. If what you say is correct, why do you think the Soviet Union desires prosecution of these demonstrators while the South African Government comes to us with an opposite conclusion?

Mr. DIGENOVA. Mr. Chairman, I suppose they have their reasons and they have expressed them to the State Department.

Senator GRASSLEY. To what extent would you feel that we respond to prosecution at the instance of some foreign government and not to another or to do it when another one desires that it be done? It seems to me that we are conspiring with a foreign government for their own domestic purposes.

Mr. DIGENOVA. Mr. Chairman, I think I can best answer that question by quoting from Judge King in his opinion, and I think it answers your question directly.

He said:

> It certainly cannot be doubted that the nature of our government's relationship varies significant from country to country amongst those with whom we enjoy diplomatic relations. Events in recent years clearly demonstrate that our diplomatic personnel and citizens require different degrees of protection in different countries. For example, we have seen attacks upon our embassies or diplomatic personnel in Iran, Lebanon, the Sudan, and Kuwait.

Senator GRASSLEY. Even overriding our Bill of Rights?

Mr. DIGENOVA. Not at all, Mr. Chairman, because that information being transferred to the U.S. Government through the State Department to the Justice Department is entirely consistent with the authority at issue. And, all the courts that have ruled on this—and, indeed, I'm reading from one judge, have said that it is a perfectly proper exercise of discretion and not discriminatory in any way.

Senator GRASSLEY. Well, it seems to me that in every official statement, at least within the last year, there has been some change in regard to South Africa, but in every respect now, both in the legislative branch now with South Africa and with the executive branch following the congressional branch and then for a longer period of time both Congress and the executive branch with regard to the Soviet Union, both of us find the human rights policies of these two countries abhorrent.

And I think what is involved with prosecutorial discretion is whether or not the wishes of these governments take precedent over the right of free expression.

Mr. DIGENOVA. Mr. Chairman, with all due respect, I do not think that is the dichotomy that is at issue here. Congress has enacted a statute which is very, very clear about what it has attempted to get at. Now, I am not free to ignore that in the context of given individual embassies, unless the government of the United States directs me to do so.

I have a constitutional responsibility to enforce the laws. Now, if it is the decision of someone else that that statute is no longer to be enforced, that is a decision which should be communicated and it has not been.

Senator GRASSLEY. I cannot argue with you on the policy set by Congress, but that has a different practical effect, being enforced through prosecution, on the one hand, or not being enforced through prosecution on the other hand.

Mr. DIGENOVA. Yes, Mr. Chairman, there are obviously differences because they are different embassies and different countries, which is what the judge I was quoting was alluding to in his finding that there was in fact no selective prosecution because there was no discrimination because the enforcement of the statute is properly based on the nature of our relationship with individual countries, which is exactly what Congress intended when it drafted the statute.

Senator GRASSLEY. I guess this exchange between us makes clear that this is very much an issue for the Congress of the United States.

Mr. DIGENOVA. Quite properly so, Mr. Chairman, quite properly so.

Senator GRASSLEY. It appears that you and I have not come to an agreement, and if this is going to be solved, we have to look at it not only from oversight but at the statute itself. But do not take that as agreement on my part with your enforcement of the statute.

Mr. DIGENOVA. Mr. Chairman, let me say that I respect your view and I respect your right to vigorously disagree not only with me but with the prior Congress that enacted this statute.

Senator GRASSLEY. Thank you very much.

Mr. DIGENOVA. Thank you, Mr. Chairman.

Senator GRASSLEY. I want to call as a witness Dina Kaminskaya. We would ask you to testify just as if you had been taken in order.

Ms. KAMINSKAYA [through interpreter]. Mr. Chairman, gentlemen of the committee, I am forced to speak Russian because my English is horrible, but my Russian is beautiful.

Senator GRASSLEY. My experience is that any person of foreign descent who says their English is terrible is probably better than most of our American English.

Ms. KAMINSKAYA [through interpreter]. As any Jew who has lived in the Soviet Union all of his or her life, Ms. Kaminskaya could tell a lot about permanent discrimination that any Jew experiences in the Soviet Union.

But she feels that it is more important to share her professional experience and to tell why the Soviet people do not defend the right of Soviet Jews to emigrate freely from the country.

It seems to her that in general one may not use the term "the right for emigration" in relation to the Soviet Union. There is no judiciary mechanism for defense of that right in the Soviet Union. And any Jew who applies for emigration does not have the right of turning to a court in case he is refused.

So what opportunity does a Soviet Jew have of defending his loudly advertised but not fully realized right for emigration? One of such forms is a demonstration of protest. But these kind of such demonstrations are always dispersed by the KGB employees and are harrassed in many ways, including being charged with criminal activity.

Both orally and in writing they can appeal to Soviet organs or they can appeal to public opinion in the west, but for these appeals they are accused of being slanderous and anti-Soviet elements. Soviet trial does not defend people who are accused of anti-Soviet slander or falsification from the most ridiculous charges.

Ms. Kaminskaya participated in many political trials and defended famous dissidents such as Bukovsky, Litvinov, Bogoraz, Marchenko and others. She agreed at her time to defend Mr. Scharansky, but that was her last professional action because several days after she gave her agreement she was fired from the Moscow Collegium of Lawyers.

She is now telling you these things in order to let you know that these people who are fighting for their right to emigration have no defense in the Soviet Union and their only hope is defense from the west. Ms. Kaminskaya has been following very attentively what has been happening to Jews, the so-called refuseniks, and lately a method of falsification of crimes was used against them.

During searches drugs or arms are left in their apartments. They are accused most ridiculously of hooliganism. Ms. Kaminskaya said that she was a very lucky, a very happy lawyer. She won most of her cases, but although she took part in many political trials she did not win one of them because in the Soviet Union there are no acquittals in political trials.

So these people against whom these most ridiculous charges are made, they cannot rely on the Soviet legal system. In the Soviet Union Ms. Kaminskaya defended the participants of demonstrations of protest. And although there were peaceful demonstrations,

the very content of their slogan, which was only adhere to the Soviet constitution, was enough to have these people sentenced to 3 years of incarceration.

But she knew people who demonstrated against the American Embassy in demonstrations against the war in Vietnam. And not one person of these people was ever criminally charged, even though they physically assaulted the American Embassy. The reason is Soviet society has a double standard attitude toward people depending on what political views the people have. So such demonstrators always remained unpunished.

Sometimes she imagines herself a judge and thinks what would happen if these demonstrators near the American Embassy in Moscow were criminally charged. Such a judge would say under the Soviet law there is an article which talks about acts committed in the state of dire necessity. And she would have said that people who had been criminally charged, they had acted in the state of dire necessity. She wants to tell you that support of the American public plays a very great role in the situation of the Soviet Jews.

She feels that those people who demonstrate against the Soviet Embassy here, they commit actions which would prevent much worse harm to the society and to humanity. She wants to tell you of her own experience, that if it had not been for support of the American public and for a very, very vocal campaign that had been waged on her and her husband's behalf, she, too, would have been stuck in the Soviet Union, whereas now the American people can enjoy life with Shcharansky and with her.

Thank you very much.

Senator GRASSLEY. Thank you very much for your testimony. I have no questions for you or the first panel, and I would thank you very much for coming, and call the third panel to the table. Paul Kamenar is the executive legal director of the Washington Legal Foundation. Mr. Kamenar and the foundation were involved in the first demonstration case prosecuted after the demonstrations began at the South African Embassy.

Henry Asbill is an attorney here in Washington and was the first person contacted by the Washington Board of Rabbis to represent arrested demonstrators. And Seth Waxman is a defense attorney, also in Washington, and has represented and continues to represent groups of demonstrators pro bono. And Arthur Spitzer is legal director of the American Civil Liberties Union of the National Capital Area. Mr. Spitzer has been involved for several years in legal cases regarding the rights of people to demonstrate in Washington, DC. I thank you all for being here, and I would ask that you speak in the way I introduced you. Please remember to summarize your statements as they will be printed in the record.

STATEMENT OF A PANEL CONSISTING OF PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR, WASHINGTON LEGAL FOUNDATION; HENRY W. ASBILL, ASBILL, JUNKIN, MYERS & BUFFONE; SETH WAXMAN, MILLER, CASSIDY, LARROCA & LEWIS; AND ARTHUR SPITZER, LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA

Mr. KAMENAR. Thank you, Mr. Chairman. My name is Paul Kamenar. The Washington Legal Foundation is a conservative public interest group and it is indeed very rare that we find ourselves in agreement on an issue with the American Civil Liberties Union, and I think that just indicates to us how widespread a concern this issue is to all Americans of whatever political persuasion.

We represent Vanna Om Strinko——

Senator GRASSLEY. Let me say that with almost any issue there can be common ground.

Mr. KAMENAR. We represent the first woman who was arrested outside of the Soviet Embassy. This is the very case that the U.S. attorney referred to earlier in his testimony citing Judge King's opinion. And consequently that case is on appeal. It is the first such case on appeal.

I might point out that not a single case cited by the U.S. attorney refers to the second clause, which is what is at issue here today, that has been rendered by an appellate court. Ours is the first such case before the D.C. Court of Appeals. There is a case pending on the civil side in the U.S. Court of Appeals of the D.C. Circuit. So I would just reiterate that the law on this subject is certainly not as settled as the U.S. attorney would have you believe.

Now, I would just like to focus my testimony on the selective prosecution issue. While we have serious doubts about the constitutionality of the law for various reasons, as well as its necessity, my colleagues here will address that aspect. But what we see here is that while Ms. Strinko and others have been arrested, prosecuted, and convicted for violating this law of dubious constitutionality, thousands of other protesters at the South African Embassy are basically getting away scot-free. And this is the issue that we argued in court, which constitutes impermissible and unconstitutional selective prosecution.

Let me review the two reasons that were indicated by the U.S. attorney and the representative from the State Department as to what justifies a decision whether or not to prosecute in a particular case. Now, the U.S. attorney gave you a list of various criteria that goes into the making of his prosecutorial decision. With all due respect, I have to say that in both demonstrator cases—that is, those in front of the Soviet and South African Embassies—there really is no difference between the two—well, can we get a conviction? Is there enough evidence here? Will the police testify. In both cases it is clear that anybody straight out of law school can get a conviction in either of these cases.

There is really no difference here. the U.S. attorney does cite the one case, our case, where 17 Cambodians were not prosecuted because they didn't understand the language. Obviously, that has to be the only result. Even if the Soviets wanted them prosecuted,

they simply could not get the conviction because that is not a violation if they did not understand the order to disperse.

But I would like to just cite quickly that there are other reasons that were not necessarily referred to by the U.S. attorney that are cited in the American Bar Association's Standards for Administration of Criminal Justice on what to consider when you decide to prosecute or not. I am quoting here: "Illustrative of the facts which the prosecutor may properly consider in exercising his or her discretion are: One, the extent of the harm caused by the offense." By, the way, that goes to show when you asked the U.S. attorney earlier, Senator, whether the speech and prayers are causing any real harm to the embassies? That is an element that the prosecutor can consider, and he did not address that. He can consider that under the ABA code of professional conduct.

The other consideration is "the disproportion of authorized punishment in relation to the particular offense or the offender." Again, we can say that that is a factor here in terms of putting people in jail for merely exercising first amendment rights.

And, finally, I would like to cite one other factor which the U.S. attorney may consider, and that is "possible improper motives of the complainant." So, obviously, if the motives of the complainant, being the Soviet Union, are improper in the sense that they're not really concerned about the safety of their Embassy; they are just enjoying crushing dissent and objections against their brutal human rights abuses; that, indeed, is a motive that the U.S. attorney should consider and he should consider it the other way and reject the prosecution rather than give into the wishes of the Embassy.

Let us look at the two factors they do site as reasons for prosecuting demonstrators, one, reciprocity, and, two, the wishes of the victim. If the question is reciprocity, that cannot possibly justify the differing treatment of protestors at the two different embassies. Obviously, all of these embassies are inviolable under article XXII of the Vienna Convention and under basic international law. One Embassy does not deserve less protection than any other Embassy. Thus, you cannot use reciprocity to justify the differing treatment of protestors at both Embassies.

If the reciprocity is country-specific, that suggests that if the Soviet Union does not like demonstrations here, they may jeopardize the safety of our personnel over there in the Soviet Union in Moscow. And what seems to be the case is that the reciprocity argument suggests we are capitulating to implicit threats of Soviet sponsored action against our Embassy rather than our wish to be protected from citizen initiated action in Moscow. As it was said earlier, there are demonstrations in Moscow going on.

So if we are seeking reciprocity, obviously reciprocity is not working unless we do not really mind the outbreaks of free speech that are being attempted in the Soviet Union. But, be that as it may, this reciprocity argument cannot be applied against the South African Embassy, as the Senator explained earlier in his colloquy with the U.S. attorney. What possible reciprocity can we get from the South Africans by not prosecuting? Are we afraid that the South Africans are going to really protect our Embassy in Pretoria? If that is the case, then we should welcome that kind of protec-

tion. Or are they going to reciprocate by not enforcing their law in South Africa to protect our Embassy?

If this is the case, the term reciprocity is being used, I think, in a self-contradictory or in an Orwellian nonsensical notion.

Finally, if reciprocal security of our personnel really is the motivation here, the U.S. attorney just mentioned one such example in terms of the Iranian hostage crisis. That, to me, would be the best case for really enforcing the law here; namely, not to have demonstrations around the Iranian Embassy while our diplomats are being held hostage. But what the U.S. attorney did not tell you is that in fact there were daily vigils going on outside the Iranian Embassy here in Washington, DC, while our diplomats were being held hostage. So if they are really concerned about this reciprocal safety, it certainly did not bother them at that point in time.

Let me turn quickly to the wishes of the Embassy argument that they are making. What this really means again is that the prosecutor is allowing the wishes of the Kremlin or the KGB to dictate criminal prosecution in the United States. Now, in terms of protection of the Embassy, both protesters at the South African and Soviet Embassy are being arrested. If there is any danger by this outbreak of free speech here in our Nation's Capital, that protection is being given by the police authorities. What interest possibly could it be of the Soviet Union to make sure that a dissident or a Jewish rabbi has a criminal record and is further prosecuted? We do not see that there is any rationale at all.

In fact, I think it would be both ironic and indeed shameful if Anatoly Shcharansky, who was prosecuted and imprisoned for years by the Soviets for peaceful dissent were to be prosecuted for standing in silent protest on a public sidewalk near the Soviet Embassy because the Soviets were able to demand and get his prosecution.

Conversely, if it is the wish of the South African Government not to prosecute anybody, then why are we going through the charade of having everybody being arrested by appointment? If the answer is, well, we have to protect that Embassy, well, then, prosecution is fully consistent with trying to protect that Embassy if indeed that is the point you are trying to make.

Finally, I would just like to cite the *Wayte* decision which the U.S. attorney also cites as to why you can make different distinctions here and why there is prosecutorial discretion. Interestingly, in the *Wayte* case the Government successfully defended its policy of prosecuting only vocal draft dodgers who did not register for the draft. The Government said in their brief, "Prosecution of vocal defendants would be especially effective to promote general deterrence and prevent the possibility of failure to proceed against a publicly known defender would encourage others to violate the law."

In these demonstrator cases, I submit, the vocal violators are precisely those liberal politicians, lawyers, and celebrities violating the law with a flourish in front of the South African Embassy rather than my client who stood silently in front of the Soviet Embassy with no signs; she was unknown. She wore no protest buttons nor was she singing any songs.

And I would just like to make a final reference to a court case that involved disruption of hearings in congressional hearings such as this. A group of demonstrators were arrested at a congressional hearing for disrupting it, for violating a law that applies to the Capitol.

The demonstrators argued that it was selective prosecution because only a few people were prosecuted for disrupting those kind of proceedings. The Government and the court said, oh, no, you have to look at who we arrested in the gallery of the Senate and the Congress as well; we prosecuted those people. Therefore, you cannot separate the location of your protest. You have to look at the whole universe of violators. We are not going to separate the places where the demonstrations occurred because the law covers both places. And as the court said in that case, the distinction being made is a classic distinction without a difference. I submit that is what is going on in our case, but in reverse. Thank you very much, Mr. Chairman.

[Statement follows:]

PREPARED STATEMENT OF PAUL D. KAMENAR

Mr. Chairman and Members of the Committee, I am Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation. Thank you for inviting us to testify before you today on the prosecution of demonstrators outside the Soviet Embassy.

The Washington Legal Foundation (WLF) is a national, nonprofit, public interest law center with 200,000 members and supporters nationwide. WLF engages in a broad range of legal activities in the courts and administrative agencies. We have represented over 200 Members of Congress and other individuals and organizations promoting a strong national security and defense, advancing the free enterprise system, advocating the rights of victims of violent crime, and defending individual liberties. It is within this latter category that WLF was asked to represent Vanna Om Strinko, a Cambodian native who was arrested for standing silently on the sidewalk in front of the Soviet Union embassy on January 18, 1985.

Mrs. Strinko was prosecuted by the U.S. Attorney for the District of Columbia who charged her with violating the second clause of D.C. Code §22-1115 which makes it a crime to congregate within 500 feet of an embassy and refusing to disperse when ordered to do so by the police. Mrs. Strinko became what appears to be the first person since 1970 to be charged with and prosecuted for violating this law. She was convicted on September 19, 1985, given a suspended sentence of 10 days in jail, and then placed on probation. We have appealed her conviction to the D.C. Court of Appeals and filed our brief on March 19, 1986. Strinko v. United States, No. 85-1330 (D.C. Ct. App.). The government's brief was due on April 18, but they have twice asked for an extension of time. Their brief is now expected to be filed by the end of this month.

Since Mrs. Strinko's arrest, dozens of other protestors have been arrested and prosecuted for congregating within 500 feet of

the Soviet Embassy, including Ukrainian students, Jewish rabbis, and other ethnic and religious groups who oppose the human rights abuses committed by the Soviet Union. Some of these defendants also plan to appeal their convictions.

The law under which Mrs. Strinko and others are prosecuted makes it a crime for three or more people to stand silently together within 500 feet of an embassy and to fail to disperse when ordered to do so by the police. The law, however, does not prevent one or two citizens from shouting epithets at the embassy all day long directly in front of the embassy. We have argued in court on Mrs. Strinko's behalf that such a law clearly runs afoul of the First Amendment's guarantee of freedom of speech and assembly, as well as being unnecessary since other laws currently on the books can be invoked to protect embassy property and personnel.

But more troubling to us, and the issue to which I will focus my testimony, is the fact that while Mrs. Strinko and others have been arrested, prosecuted, and convicted for violating a law of dubious constitutionality, thousands of other protestors who have protested in front of the South African Embassy and arrested for violating the same provision of the law as Mrs. Strinko, have been spared prosecution and seem to enjoy official immunity granted by the U.S. Attorney. Accordingly, we have argued in court that this double standard constitutes impermissible and unconstitutional "selective prosecution" by the U.S. Attorney. The Washington Post twice has editorialized against this discriminatory treatment. (See Exhibits 1 and 2).

In the course of trying to determine the reasons for the discriminatory prosecution of Mrs. Strinko, we attempted to subpoena the U.S. Attorney, Joseph E. diGenova. The U.S. Attorney obtained a court order quashing our subpoena and has thus far successfully resisted to explain to the court in our case or any of the other similar cases, his reasons for this dual system of prosecution. Rather than present his reasons in court under oath

and subject to cross-examination, the U.S. Attorney has chosen to defend his position privately as well as publicly through various press interviews and other forums. In addition, Abraham D. Sofaer, Legal Advisor of the State Department, recently wrote a letter to the editor of the Washington Post dated March 3, 1986, in an attempt to justify the prosecutor's double standard, a copy of which is attached hereto as Exhibit 3. Both of these government officials have agreed to testify today on this issue, and although I did not have the benefit of their testimony when I prepared mine, I will presume their position is the same as that presented in the Sofaer letter, as well as that suggested in the government's court briefs in our and other cases.

EXCUSE NO. 1: "RECIPROCITY" REQUIRES THAT THE UNITED STATES ENFORCE THE LAW SO THAT OUR EMBASSIES ABROAD WILL BE PROTECTED.

The primary reason proferred by the government for enforcing the anti-demonstration law is not only to protect foreign embassies and diplomats here, but by example to protect our embassies abroad. In Finzer v. Barry, C.A. No. 84-0899 (D.D.C. May 27, 1984), appeal pending, No. 84-5327 (D.C. Cir.), the government again emphasized that the enforcement of §22-1115 is supposedly necessary to maintain security of diplomatic personnel here and abroad, and that "the last impression we should give to our diplomatic contacts around the world is that we are curtailing protection to foreign embassies in Washington." Gov't. Brief at 20 (emphasis added).

As we stated in our brief in the Strinko case, these high-sounding justifications for prosecuting protesters at the Soviet Embassy might have some semblance of credibility were it not for the fact that they have been routinely disregarded in the cases of thousands of protesters at the South African Embassy. Thus, the United States cannot convincingly claim even-handed protection for its own embassies abroad when its own enforcement policies are blatantly discriminatory as between different countries.

If the rationale for prosecuting Mrs. Strinko was a genuine concern for the sanctity and security of diplomatic missions, then similar prosecutions at the South African Embassy would have been pursued long ago. The South African Embassy is no less fully accredited than its Soviet counterpart; its entitlement to inviolability under Article 22 of the Vienna Convention and under basic international law is no less than that of the Soviet Embassy.

Thus, this "reciprocity" position cannot possibly justify the differing treatment of protestors at two different embassies. This position suggests that since the Soviet Union dislikes any form of protest however peaceful near its embassy, we better enforce the law to its fullest lest the Soviet Union allow demonstrators to protest peacefully near the U.S. Embassy in Moscow. No one can seriously maintain, however, that the safety of U.S. personnel or property is jeopardized by Moscovites standing in silent protest near the U.S. Embassy. Indeed, any such demonstration would either have to be sanctioned or orchestrated by Soviet government officials. Thus, the "reciprocity" argument suggests that we are capitulating to implicit threats of Soviet sponsored action against our embassy rather than our wish to be protected from citizen initiated demonstrations.

In fact, demonstrations do take place in front of our embassy in Moscow concerning our position on arms control or the recent U.S. action against Qaddafi, with no threat to our personnel. Thus, the concept of "reciprocity" in these cases is not based on genuine concerns of safety, and if it is, the policy is obviously not working since demonstrations continue at our embassy in Moscow despite the crackdown here against U.S. citizens.

Be that as it may, it should be obvious to anyone that the concept of "reciprocity," however invalid vis-a-vis the Soviet Union, does not explain the non-prosecution policy with respect to protestors at the South African Embassy. Are the U.S. Attorney and State Department suggesting that if we prosecute South African

protestors here, then the Government of South Africa will "reciprocate" by prosecuting protestors near our embassy in Praetoria? If so, is this not the kind of "reciprocation" that we want in order to protect our embassy officials in South Africa? Or is the U.S. Attorney suggesting that if we enforce the law here, then South Africa would "reciprocate" by not enforcing their law there to protect our embassy in South Africa? This convoluted or negative "reciprocity" rationale is self-contradictory and nonsensical.

Finally, if the reciprocal security of our personnel requires that the law be fully enforced with respect to certain embassies to protect our diplomatic personnel abroad, one would think that the best case for the law to have been scrupulously enforced occurred during the Iranian hostage crises when our diplomats were held hostage and their very lives were being threatened. Yet during most of that dangerous and volatile period, daily vigils and other public demonstrations were held here in front of the Iranian Embassy in Washington, D.C. without any arrests before the Iranian embassy was ordered closed by President Carter. See Affidavit of Deputy Chief of Police John C. Connors, ¶8, dated May 7, 1984 submitted in Finzer v. Barry, No. 84-0899 (D.D.C. 1984). So much for the genuineness of the government's "reciprocal safety" argument.

The U.S. Attorney simply cannot have it both ways on this issue. It cannot invoke principles of even-handed diplomatic sanctity in prosecuting a solitary Cambodian-American protesting against the Soviets, while it condones systematic violations at the South African Embassy with congenial indulgence.

EXCUSE NO. 2: "THE RESPECTIVE PROSECUTION DECISIONS REFLECT THE WISHES OF THE EMBASSIES INVOLVED."

The other reason given by the government which was not made in court for the dual prosecution policy is, to use the words of Abraham Sofaer from his Washington Post letter, to "reflect the wishes of the embassies involved." In essence, this position

means that U.S. Attorney for the District of Columbia is allowing the Kremlin and KGB to dictate the criminal prosecution of U.S. citizens. It also means that the government of South Africa can prevent the prosecution of protestors. This unprecedented abdication of prosecutorial discretion to the whims of foreign governments is somehow justified by stating that in any crime, the wishes of the "victim" are factored into the enforcement process. As with the "reciprocity" excuse, this "wishes-of-the-victim" excuse falls apart upon closer analysis.

In the first place, protestors at both the South African and Soviet Embassies are being arrested. Thus, to the extent that the embassies need protection from these outbreaks of free speech, they are getting it. But what interest is it of the Soviet Union to ensure that U.S. citizens are not only arrested, but also prosecuted and have a conviction record? Since when does the United States allow the Kremlin to dictate our internal prosecution policy?

To compare this "crime" to other crimes where the legitimate interests of the victim are considered by the prosecutor is absurd. Would the U.S. Attorney drop a child molestation or rape charge, for example, because the victim for whatever reason, did not wish the rapist to be prosecuted, even if the victim's testimony was not needed because there were other reliable witnesses to the crime? We would hope not. But the "wishes of the victim" reason suggests that very outcome. It should be remembered that in all of these demonstrator "crimes," the complaining witness listed on the police forms is not the embassy in question, but the arresting police officer. Unlike other crimes, the alleged "victim's" testimony or cooperation is simply unnecessary to secure a conviction for protesting.

Conversely, if it is the wish of the South African government that the U.S. Attorney not prosecute any of the demonstrators near their embassy, why then do we go through the charade of having the demonstrators arrested as they are now by appointment, needlessly

expending considerable police resources? If the answer is to protect the embassy property, then prosecution is fully consistent with that policy.

Indeed, if we are to follow the government's prosecution policy for other crimes, a different result would obtain. For example, in Wayte v. United States, 105 S. Ct. 1524 (1985), the government successfully defended its policy of prosecuting vocal or known draft registration resisters. The government in Wayte stated: "the prosecution of 'vocal' defendants would be especially effective to promote general deterrence and prevent the possibility that the failure to proceed against a publicly known offender would encourage others to violate the law." Gov't. Brief at 34 (footnote with cases cited omitted). In these demonstrator cases, the "vocal" violators are precisely those liberal politicians, lawyers, and celebrities violating the law with a flourish in front of the South African Embassy, rather than my client Mrs. Strinko who by contrast is relatively unknown and whose protest was silent. According to the government's own normal prosecutorial policy, therefore, the government should be prosecuting at least some of those protesting in front of the South African Embassy.

Fortunately, the plain language of §1115 in itself refutes the government's attempt to concoct a false dichotomy between violations at different embassies. The straightforward statutory language makes it illegal to "congregate within 500 feet of any [foreign embassy]" [emphasis added] -- not merely those occupied by Marxist powers that have the power to demand (and get) diligent prosecution.

Thank you for the opportunity to present our testimony. I will be glad to answer any questions the committee may have.

WEDNESDAY, MARCH 27, 1985 EXHIBIT 1

THE WASHINGTON POST

One Protester's Protest

TALK ABOUT inconsistent treatment of demonstrators in this capital of the free world: Some 1,655 people are charged with breaking a law by demonstrating within 500 feet of the South African Embassy and U.S. Attorney Joseph E. diGenova has all federal charges dropped before anybody even goes to court. Three other people do the same thing in front of the British Embassy and they, too, go free with charges dropped. Then one woman is arrested for the same offense in front of the Soviet Embassy—and Mr. diGenova proceeds to prosecute her. Can you explain the difference?

If Mr. diGenova can, he should—because neither the public nor the woman, Vanna Om Strinko, a refugee from Cambodia who is now a U.S. citizen, has heard any sensible explanation for this uneven justice. Prosecutors do have almost unlimited latitude in deciding which cases they want to take to court, but there's no reason why they should not explain, to an understandably curious public, what it is they think they're doing. If 1,655 people (at last count) are let go, why not 1,656? Or why not take all the cases to court for disposition?

The **Washington Legal Foundation**, which is representing Mrs. Strinko, perceives a difference in the treatment of "liberal" and "conservative" causes. If there is anything to this, it should be clear all around that such an approach has no place in a fair system of justice.

The political aspects of this contrast become doubly fuzzy given still other differences in the treatment the protesters have sought and in the handling of cases at the federal and local levels. The leaders of the demonstration at the South African Embassy actually have wanted their day in court, with all the public exposure and whatever punishment that might come from it. In some of the cases that came under local jurisdiction, the D.C. Corporation Counsel cited the merits of the demonstrators' views as grounds for not prosecuting. That's totally wrong, and Mr. diGenova at least has not taken that position.

There's nothing wrong with the 500-foot rule at embassies as a uniform protection. But the law should be enforced without the arbitrariness that is apparent here.

Saturday, February 22, 1986 EXHIBIT 2

A U.S. Attorney's Random Justice

ONE OF THE continuing mysteries of prosecution in the capital city is a dual standard of treatment by U.S. Attorney Joseph diGenova's office of people who choose to demonstrate in front of embassies here. It's been going on for more than a year now and has yet to be explained satisfactorily. It boils down to this mysterious difference: if you demonstrate in front of the Soviet Embassy, you're likely to be charged, prosecuted and punished, but if you demonstrate in front of the South African Embassy, you may be charged but the charges are dropped before you get near a court. What kind of interpretive latitude is this?

We're not talking isolated instances. In March 1985, we noted that some 1,665 people had been charged with breaking a law by demonstrating within 500 feet of the South African Embassy. Mr. diGenova had seen to it that charges were dropped before anyone went to court. The number has since passed the 2,000 mark, and the policy hasn't changed. Meanwhile, those who protest within 500 feet of the Soviet Embassy are going to court; just the other day, 21 students were convicted, given 15-day suspended sentences and ordered to pay $60 each in fines and court costs. What's the difference?

In a letter last summer to a House Judiciary subcommittee chairman, Mr. diGenova cited legal precedents that he said allow discretion in choosing how or whether to prosecute. He says this can take into account the wishes of ambassadors at the embassies where the incidents occur and the possibility of retaliation against U.S. embassies if protesters here are let go without charges.

At that rate, you could wind up with 100 different treatments of protesters, each tailored to the whims of a different ambassador around town. It might be a politically convenient arrangement, but it's no way to enforce a law that applies uniformly to every embassy—and should be enforced with some semblance of equity.

APPENDIX A EXHIBIT 3

THE WASHINGTON POST, MARCH 3, 1986

Prosecution of Demonstrators Isn't Random

The Post's recent editorial condemning the apparent lack of uniformity in prosecuting demonstrators at foreign embassies ["U.S. Attorney's Random Justice," Feb. 22] fails to give adequate attention to some basic truths.

With respect to the embassy-demonstration statute, the Department of Justice and the Department of State agree on two propositions. First, enforcement of the statute serves important governmental interests. The U.S. government is obligated to protect foreign embassies and consulates located in this country. Only by providing adequate protection here can we expect other nations to protect our own facilities abroad. Considerations of reciprocity are therefore a critical element underlying the statute. U.S. refusal to enforce the statute with respect to a given nation's embassy might well lead to retaliatory measures against our offices in that nation.

Second, the wishes of the "victim" are highly relevant to a decision whether to prosecute a criminal violation, whether under this statute or any other. In particular, when a nation whose embassy is protected by the statute does not wish to see violators prosecuted, trying the case makes little sense. Non-prosecution, in that instance, does not give rise to a threat of reciprocal action by the other government, because it has waived the statutory protection here. Indeed, pressing forward with a prosecution over the objections of the foreign government might itself affect adversely our relations with that nation.

It is inevitable that prosecuting demonstrators at some embassies but not others will strike some as discriminatory. But where the respective prosecution decisions reflect the wishes of the embassies involved, the distinction is wholly proper. The alternatives posed by demands for uniform prosecution decisions, moreover, are unacceptable.

One alternative is to prosecute all demonstrators who violate the statute, even when the embassy involved declines to press charges. Such a policy would represent an inefficient use of prosecutorial and judicial resources and could lead to friction with a foreign state that preferred not to see the demonstrators prosecuted.

The other alternative is to prosecute no demonstrators who violate the statute, even when the embassy involved demands full enforcement of the law. This alternative would be tantamount to de facto repeal of the statute and a violation of our obligations under international law. It undoubtedly would lead other nations to take retaliatory measures against U.S. facilities and result in diminished security for our personnel abroad.

ABRAHAM D. SOFAER
Legal Adviser, U.S. Department of State
Washington

Mr. ASBILL. Thank you, Mr. Chairman. I will not waste your time reading the prepared statement that I submitted earlier, but I do want to summarize it and highlight a few of the points that I have made. I would also appreciate the committee taking notice that in addition to the Jews in the Soviet Union others have suffered a great deal from the policies of that country's present regime as well. They include those Cambodians on whose behalf Ms. Strinko protested and Latvians and other Baltic States people, the supporters of whom have engaged in similar demonstrations.

I think Mr. Kamenar pointed out that there is more to these prosecutions than meets the eye, and that is something I will ask this committee to investigate. Mr. diGenova and Mr. Sofaer have talked orally, and in writing, in legal terms, about the Government's rights under the rules of the superior court, the case law, and statutes which apply therein in an effort to convince this committee that the Justice and State Departments have properly handled these cases. I ask that you take, however, in your oversight capacity a broader view—from moral, Government spending, and other perspectives and ask yourselves based on what you have heard and what you have read if this is the way you want our Government to act, regardless of what the letter of the law may technically permit. Mr. diGenova and Mr. Sofaer are probably the only people either here or abroad that would answer that question in the affirmative.

Since April of 1985 I have represented, pro bono, members of the Soviet Jewry Committee of the Washington Board of Rabbis who, frustrated at the failure of their own and our public officials' diplomatic and political efforts, sought to bring renewed pressure on the Soviet Government through demonstrations at the Embassy. There, they planned to protest against the Soviets' ongoing and escalating oppression of Jewish activists and religious leaders in violation not only of the most basic concepts of human rights and international law but also in contravention of the Soviet's constitution itself.

These transgressions, in the rabbis' views, demonstrated a continuation of and a clear and present future intent by the Soviets to engage in a systematic pattern of cultural, religious, and, at times, physical genocide of Jews in that country. In the face of such transgressions, which have been repeatedly recognized in congressional and State Department reports and in speeches by our public officials, my clients, compelled by their religious principles, felt in good conscience they could not stand idly by.

I agreed initially to represent 24 rabbis and 1 Lutheran minister who shared their goals at a demonstration on May 1, 1985. They chose that date in part because of its symbolic significance in terms of being May Day in the Soviet Union and Law Day in the United States. Thereafter, as the movement my clients commenced broadened, I further served as the coordinating attorney for seven subsequent demonstrations over the past year. I enlisted the assistance of other defense counsel, like Mr. Waxman, from area firms, on a volunteer basis represent other protesters, and I consulted with each of those lawyers on trial tactics and strategy. To date, approximately 150 rabbis, students, and Hebrew teachers have been convicted in nonjury trials by judges of the D.C. Superior Court, and their cases are now pending appeal. All of the volunteer attor-

neys will be involved in that process as well. In analyzing the appropriateness of the Justice Department's response to these demonstrations, it is important in my view in terms of the ultimate action Congress may take through remedial legislation or other means for you to understand at the outset both the nature of the conduct in which the rabbis engaged and the nature of their legal defenses which are being pursued at this moment. As for their actions—and I want to take issue with Mr. diGenova here—my clients and the others who have followed them, prior to the demonstrations, advised the police they were going to protest at the Embassy, negotiated a time for the demonstration which would impact least adversely on police resources and provided names, addresses, and other biographical information of those who expected to be arrested.

The rabbis took extreme care not to violate, technically or otherwise any law or city ordinance aside from the congregation clause of 22 D.C. Code, section 1115. And they were fully prepared to cease and desist from their activites if for any unanticipated reason the demonstration started to go in an unplanned direction. During the course of the protest, contrary to Mr. diGenova's statement, the defendants never blocked ingress or egree to the Embassy or in any way impeded the conduct of the Soviet's business or in any way threatened, intimidated, or harrassed any Embassy personnel. I witnessed the demonstration in which my clients engaged. Mr. diGenova did not.

Further, I advised them and every other attorney involved in the subsequent cases to caution their clients in advance that if they kept their conduct to the strict confines of the congregation clause of 22-1115, they would not run afoul of any other laws that might have been applicable to such demonstrations. And I do not believe any of the subsequent defendants violated any other laws. During the course of their protest at the Embassy, the rabbis chanted. They prayed. They sounded the shofar. And they read aloud statements of protest about the Soviets mistreatment of specifically named Hebrew teachers and cultural activists who at the time of the demonstration had been singled out for inhumane and illegal treatment by the Soviets solely for their attempts to exercise their human rights.

In short, the demonstrators in each instance conducted for only a few minutes—and I mean 3 or 4 minutes—before they were arrested the types of religious and religious-related activities for which their colleagues in the Soviet Union were imprisoned, exiled, and tortured. In response, and in marked contrast to the Government's handling of the antiapartheid demonstrators at the South African Embassy, my clients were not only arrested and removed from the scene but were also prosecuted to the fullest extent of the law.

Now, as for the defenses which are being pursued, as Mr. Kamenar and Mr. Waxman, will make clear, it is obvious has that under the specific facts of these cases the rabbis and others like them were selectively prosecuted under a patently unconstitutional statute. But the Government did not stop with arresting these individuals.

Pretrial, as you would expect, the prosecutors defended the Government against claims that the statute was unconstitutional or

that it was being selectively enforced. And I do not blame them for doing that. But at the trial itself, the U.S. Attorney's Office successfully moved to preclude the rabbis from raising their common law defenses of necessity, defense of others and justification under international law. By so doing, they stripped the rabbis of their most fundamental constitutional right, the right under the sixth amendment to have their day in court, to have a chance, whether they ultimately win or lose, to explain in defense of the charges why they did what they did. And on that point, one other legislative initiative aside from repealing the statute, that Congress might wish to consider is whether or not the defense of necessity to charges such as this ought to be codified.

In the case that I handled where the leaders of this movement were the defendants, the Government further opposed my clients' requests for bond pending appeal. It also opposed the rabbis' motion for a brief stay of execution of the sentences imposed on five of my clients who went to jail; and as a result, those five individuals were incarcerated during the week of Hanukkah without having been afforded an opportunity to arrange for other rabbis to substitute for them in ministering to the needs of their congregants during that holy season. The Government further opposed a motion which, under the court rules, would have permitted one rabbi who was hospitalized to be absent from the trial and another whose pretrial, during the 4-month period that these motions to dismiss were under consideration by the court, went on sabbatical to Israel to also be excused from having to attend the proceedings. As a result a bench warrant was issued for my client in Israel, and the one who was in the hospital left, against medical advice, to attend his trial.

Whether or not my clients ultimately prevail in the courts on the legal issues raised by these prosecutions, the overwhelming public perception of the Government's handling of these cases is that the U.S. Attorney's Office acted in an unfair and counterproductive way. And they did it, I submit, in a patent attempt to intimidate the rabbis and others who might feel compelled to speak out against Soviet transgressions by protesting at the Embassy in a very peaceful, nonintrusive manner, designed to let the Soviets know that the eyes of the world are upon them and that they cannot commit these transgressions without public scrutiny. While the Government may have had a right, and I underscore that word "may" because I am not convinced of that yet, to take the positions that they did in legal terms, they did not have a moral one. I ask you whether the appearance of justice has been upheld in these cases, for it is the prosecutor's obligation not just to convict lawbreakers, but to also ensure that justice is done. And in cases such as this, that latter obligation requires the Government to exercise some discretion on its own instead of capitulating in all respects to the demands of a state legendary for its own violations of the legal principles which we all hold so dear.

As the chairman pointed our earlier today, it is indeed ironic that the joint leadership of Congress a couple of days ago honored Natan Shcharansky at a ceremony in the great rotunda while during the past year the U.S. Attorney's Office in the District of Columbia has prosecuted to the hilt those who sought and perhaps

in some small way helped to free Mr. Shcharansky. As he said himself after meeting with the President: "Quiet diplomacy can only help if it is supported by strong public pressure."

I ask the committee to take whatever steps are necessary to ensure that protesters such as the rabbis can continue to do what they did without fear of being prosecuted. Thank you.

[Statement follows:]

62-306 O - 86 - 4

PREPARED STATEMENT OF HENRY W. ASBILL, ESQ.

Mr. Chairman and Members of the Subcommittee:

I appreciate the honor and privilege of appearing before you today and testifying about some of the public policy issues raised by the Government's recent criminal prosecution of demonstrators outside of the Soviet Embassy on 16th Street. And, like the others who have or will testify today, I hope my remarks will assist you in your investigation.

I am an attorney with the firm of Asbill, Junkin, Myers & Buffone here in Washington specializing in criminal and civil trial and appellate litigation. Since April of 1985 I have represented, pro bono, members of the Soviet Jewry Committee of the Washington Board of Rabbis who, frustrated at the failure of their own and our public officials' diplomatic and political efforts, sought to bring renewed pressure on the Soviet government through demonstrations at the Soviet Embassy. There, they planned to protest against the Soviets' ongoing and escalating oppression of Jewish activists and religious leaders in violation not only of the most basic concepts of human rights and international law but also in violation of the Soviet Constitution itself. These transgressions, in the rabbis' view, demonstrated a continuation of and clear present and future intent by the Soviets to engage in a systematic pattern of cultural and religious, and in some cases physical genocide of Jews in that country. In the face of such transgressions, which have repeatedly been recognized in Congressional and State Department reports and in speeches by our public officials*, my client, compelled by their religious principles, felt that in good conscience they could not stand idly by.

I agreed, initially, to represent 24 rabbis, and one Lutheran minister who shared their goals, at a demonstration which took place on May 1, 1985. They chose that date for the protest, in part because of its symbolic significance in terms of being May Day in the Soviet Union and Law Day in the United States. Thereafter, as the movement my clients commenced broadened, I further served as the co-ordinating attorney for seven subsequent demonstrations over the past year. I enlisted the assistance of other defense counsel from area firms to represent, on a volunteer basis, later protestors and consulted with those lawyers on trial tactics and strategy. To date, approximately 150 protestors

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* See, e.g., Attachment "A".

have been convicted in non-jury trials by judges of the D.C. Superior Court, and their cases are now pending in the D.C. Court of Appeals. I, and several other of the attorneys I enlisted, will also be involved in a major way in that aspect of the litigation as well.

In analyzing the appropriateness of the Executive Branch's response to these demonstrations, it is important, in my view, in terms of the ultimate action Congress may take through remedial legislation or other means, for you to understand from the outset both the nature of the conduct in which the rabbis engaged and the nature of their legal defenses which are being pursued on appeal. My clients, and the others who have followed them, prior to the demonstration advised the police they were going to protest at the Embassy, negotiated a time for the demonstration which would impact least adversely on the police resources, and provided names, addresses, and other biographical information for the participants to the police. The rabbis took extreme care not to violate, technically or otherwise, any law or city ordinance aside from the congregation clause of 22 D.C. 1115 and were fully prepared to cease and desist from their activities if, for any unanticipated reason, the demonstration started to go in an unplanned direction. During the course of the protests, the defendants did not block ingress or egress to the Embassy or in any way impede the conduct of the Soviet's business or threaten, intimidate or harrass any Embassy personnel. Rather, they chanted, prayed, sounded the shofar and read aloud statements of protest about the Soviets mistreatment of specifically named Hebrew teachers and Jewish cultural activists who were, at the time of the demonstration, being singled out for inhumane and illegal treatment by the Soviet government - solely for their attempts to exercise their most basic human rights. In short, the demonstrators conducted, for only a few moments until they were arrested, the types of religious and religious-related activities for which their colleagues in the Soviet Union had been imprisoned, exiled and tortured. In response, and in marked contrast to the Government's handling of the anti-Apartheid demonstrators at the South African Embassy, my clients were not only arrested and removed from the scene but also prosecuted to the fullest extent of the law.

I think these cases have been mishandled by the Justice Department for a number of very important reasons. To begin with, the statute under which the rabbis were prosecuted was selectively enforced. No conceivably valid reason existed for singling out the rabbis peaceful and non-violent conduct for treatment different than those who protested at the South African Embassy. Secondly, given the non-offensive and non-intrusive nature of their protest, the selective application of the law to the rabbis at the

whim of the police on the scene and the United States Attorneys' office in court demonstrates beyond any doubt that the statute, as applied to the facts of this case, is unconstitutionally vague and overbroad. Moreover, despite the fact that the rabbis were compelled by their religious teachings and principles of common and international law to do what they did, the Government opposed their right to even present their defense to the charges. *

The Government has argued the statute is not infirm and is "necessary" to protect our diplomats abroad, that it was not singling out the rabbis for impermissible reasons since the South African and Soviet protests were not "similarly" situated because they were held at different locations in the city and because the Soviets, but not the South Africans, requested enforcement of the law, and that "necessity" and international law defenses should never be permitted to be raised in these types of cases. The first two of those arguments, as Mr. Waxman and Mr. Kamenar have demonstrated, are specious at best. What evidence has the Government ever offered to demonstrate that the Soviets "reciprocate" in this regard? Should the Kremlin dictate the exercise of prosecutorial discretion in our Nation's Capitol? The last argument, which I submit is the weakest and most offensive of all, since it most closely parallel's the procedures the Soviets employ in their "joke" of a criminal justice system, was used by the Government to deprive the defendants of their single most basic and fundamental Constitutional right - to have their day in court to explain why they did what they did. The various Superior Court judges who have handled these cases upheld the Government's positions on these issues for reasons, I submit, having less to do with the legal and factual merits of the arguments than with administrative and financial resource concerns and a reluctance, as trial judges in a local court system, despite clear statutory authority, to find any Constitutional infirmities in the prosecution's arguments.

If the Soviets did, in fact, ask anyone in the Executive Branch or the State Department office to "enforce our country laws" with respect to the rabbis, that request could have been honored by arresting the demonstrators, removing them from the scene,

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* The rabbis maintained the common law defense of necessity and defense of others (which permits one in certain situations to technically violate the law in order to avert a greater evil and to protect another who has a right to act in self defense) coupled with principles of international law and treaties the Soviet Union and the United States have signed (which stand on a higher level in Constitutional terms than the Congressionally-enacted statute at issue), justified their conduct.

and dismissing the charges against them - just as was done with the South African demonstrators. And, if the Soviets specifically requested that that the rabbis be prosecuted to "the fullest extent of our laws", such an attempt to usurp the executive's discretionary perogatives should have been rejected out of hand - not only because the Soviets have no business telling us how to administer our criminal justice system but also because their only argument for such a "heavy-handed" enforcement request, i.e., "reciprocity", is a totally specious claim. Had we been afforded the opportunity to put on evidence on our selective prosecution motion, I am absolutely confident that the Government could produce no witness who could testify under oath that the Soviets either have a law similar to 22 D.C. Code §1115, or if they do, that they prosecute any of their citizens who demonstrate at the American Embassies in Russia in the harsh manner visited upon my clients. Indeed, for conduct by Soviet demonstrators at our embassies which is much more offensive to us that the Rabbis' conduct could have been to the Soviets, Russian citizens are not prosecuted at all for one very simply reason: their own government has encouraged them to demonstrate. Moreover, from a practical perspective, in terms of conserving sparse judicial resources, the policies of the United States Attorneys' office here was extremely ill-advised as well. Had the Rabbis only been arrested, but not prosecuted, the extensive litigation which the defense of these cases has required would never have occurred and would not now still be on-going.

The Government, further, at the direction of the United States Attorney for the District of Columbia, upped the ante in the case I handled by opposing bond pending appeal despite the legally difficult and novel nature of the aforementioned issues and despite the obvious fact that my clients were not about to flee or pose a danger to the community. The U.S. Attorneys' Office even opposed a brief stay of execution of the sentences during the week of Hanukkah so my clients who chose to go to jail in protest of the Government's handling of the case could arrange to have other rabbis substitute for them in administering to the needs of their congregations during the incarceration. And, as a result of this "prosecute to the limit" strategy employed by the United States Attorneys' office, the overwhelming public perception (both locally, nationally and internationally), is that the demonstrators were treated very unfairly by the executive and judicial branches of our Government. Ironically, this fact has in some measure served to misdirect the focusing of public attention on the Soviets' conduct, which was the goal of the demonstrators, onto our country's conduct instead. That unfortunate result, as well as the concommitant drain on our Government's financial resources, could

easily have been avoided by a more rational exercise of prosecutorial discretion.

Therefore, I ask, not only on my clients' behalf and for all of us concerned with putting an end to human rights violations wherever they occur but also as a citizen concerned with wasteful spending by the Government, that you as members of the Senate Judiciary Committee, require the representatives of the Department of Justice and State to explain to your satisfaction, not only in "legal" but in moral and practical terms as well, their conduct in the handling of these cases. If they cannot satisfy you with their answers, you should take whatever legislative action is necessary so that this type of unseemly conduct cannot recur. It is ironic indeed that the joint leadership of Congress only days ago honored Natan Scharansky at a ceremony in the Great Rotunda of the United States Capitol while during the past year the Executive Branch has prosecuted to the limit those who sought, and perhaps helped, via the exercise of their First Amendment rights, to set him free. For, as Mr. Scharansky himself said after meeting with President Reagan: "Quiet diplomacy . . . can only help if it is supported by strong public pressure . . .".

Thank you.

ATTACHMENT A

1. Country Reports on Human Rights Practices for 1984: Report Submitted to the Committee on Foreign Relations, U.S. Senate, and Committee on Foreign Affairs, U.S. House of Representatives by the Department of State in Accordance with Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as Amended, S. Print 99-6, 99th Cong., 1st Sess. 1119-1135 (H. Comm. Print, Feb. 1985).

2. U.S. Department of State, Nineteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of the Helsinki Final Act, April 1, 1985-October 1, 1985 (1985) at 3-4, 12-13, 19, 58, 64 (approved final draft).

3. U.S. Department of State, Eighteenth Semiannual Report by the President to the Commission on Security and Cooperation in Europe (CSCE) on the Implementation of Helsinki Final Act, October 1, 1984 - April 1, 1985 at 2-3, 25 (Spec. Rep. No. 130).

4. Basket Three: Implementation of the Helsinki Accords: Hearing before the Commission on Security and Cooperation in Europe, Vol. VI, 95th Cong., 2d Sess. (1978).

5. Soviet Jewry: Hearings Before the Subcommittee on Europe of the House Committee on Foreign Affairs, 92d Cong., 5th Sess. (Nov. 1971).

6. U.S. Department of State, Report: The Soviet Crackdown on Jewish Cultural Activists (Jan. 29, 1985);

7. U.S. Department of State, Press Statement: Soviet Persecution of Jewish Cultural Activists (June 14, 1985);

8. U.S. Department of State, Briefing Paper: Soviet Human Rights (Fall 1984);

9. Plenary Statement by U.S. Ambassador Richard Schifter on Discrimination Against National Minorities to HREM Meeting of the Commission on Security and Cooperation in Europe (May 28, 1985).

10. Plenary Statement by U.S. Ambassador Richard Schifter on Freedom of Religion in the U.S.S.R. and Czechoslovakia to HREM Meeting of the Commission on Security and Cooperation in Europe (May 17, 1985).

Senator GRASSLEY. I am afraid we will have to take a short recess while I vote.

Mr. WAXMAN. I do not mind waiting, Mr. Chairman.

[Brief recess.]

Senator GRASSLEY. Thank you for being patient.

Mr. WAXMAN. Thank you, Mr. Chairman. I want to address two brief comments to statements that Mr. diGenova and Mr. Sofaer made and then give a short summary of my written testimony. Mr. Sofaer and Mr. diGenova were careful to point out repeatedly that they did not think that they were administering this statute in anything other than a content-neutral fashion.

I do not think that is true, as a matter of fact. I do not think this statute can be enforced in a content-neutral basis. First of all, the first clause of the statute makes it illegal to carry a flag or a banner within 500 feet only if it brings within public odium the country of the embassy that is within 500 feet. In other words, if somebody stands 400 feet from the Soviet Embassy and carries a banner that says "Viva Gorbachev," he has not violated the law. If he stands there with a sign that says "Free Soviet Jewry," he has. That is not content-neutral.

Second of all, with respect to the congregation clause, I just wonder what would happen if the Trans-Africa demonstrators and the Soviet demonstrators switched places for a day and the Free Soviet Jewry demonstration occurred in front of the South African Embassy and the trans-Africa antiapartheid demonstration occurred in front of the Soviet Embassy. I am willing to bet that neither party would be arrested, and I do not think that the Soviet Embassy could legitimately ask that the trans-Africa people be prosecuted. The only case that has ever construed the congregation clause has said that on its face it is unconstitutional. It is constitu-

tional only if it is limited to demonstrations that relate to the embassy involved. So I do not think that the law is content-neutral. I do not think it can be enforced in a content-neutral fashion.

Third, with respect to the discretion that Mr. diGenova speaks of regarding the way in which the law is exercised, he says the decision is made on a case-by-case, demonstration-by-demonstration basis. That is a preposterous statement. Over 2,500 people have demonstrated in front of the South African Embassy and not one of them has ever been prosecuted; 150 people have stood in front of the Soviet Embassy, and the only people who have not been prosecuted are those who do not speak English. I have a client who had the most pressing urgent reason why she could not undergo a trial on the date set. We asked that the case be dismissed or nolled personal reasons, and there was a refusal. It went up the chain of command in Mr. diGenova's office, and the answer came back, "We are making no exceptions."

A final point with respect to supposed communications between the Soviet Embassy and our State Department about prosecution or nonprosecution in these demonstrations. I have done everything in my power as an advocate and as a citizen to discover if in fact any such communications have occurred. I filed an FOIA request and was told that there were no such communications. I have written letters and been told the same thing. I filed a motion for discovery in a case in which I represented Mrs. Daniels and other people, and the Government objected to that. I subpoenaed the Secretary of State or his representative; they declined to appear. And I have talked with people in the State Department who have assured me that they know of no such communications.

Now, let me turn briefly to the substance of what I wanted to tell the subcommittee today. Yes; these cases raise a number of very troubling constitutional issues, as the whole conduct of this hearing has demonstrated. Are these people being selectively prosecuted as a matter of law or as a matter of policy? What kind of a system of justice do we have in these cases when the defendants aren't allowed to testify themselves or to put on evidence in support of the defenses they seek to raise at trial? And what kind of a statute is it that makes it a crime for an elderly woman to stand 499 feet away from the Soviet Embassy—which by the way includes areas not even on 16th Street. If that woman holds one sign that says "Free Soviet Jewry" that's a violation of this law, and from what Mr. diGenova tells us, it is going to be enforced. These are all serious constitutional questions. And as I am sure you have seen today, Mr. Chairman, lawyers love to debate about constitutional issues. But while we are debating and while hearings are being held and these trials are going on, hundreds and thousands of people are being arrested for exercising their constitutional rights.

I want to suggest to the subcommittee that all of these questions can be mooted out completely if Congress will repeal the 1937 D.C. statute and subtract six words from the Federal statute that applies to all other 50 States. And the six words are "with the exception of the District of Columbia."

Mr. Chairman, you asked Judge Sofaer who declined to answer—whether these people would have been prosecuted or arrested if the Federal statute had been in effect. The answer is no and it is im-

portant to look at the substance of the Federal statute, which was passed, by the way, at the request of the Nixon administration. There has never been recorded a single complaint about the adequacy of that law to protect missions and consulates anywhere else in the country.

Let us take a look at the two different statutes. The 1937 statute prohibits anybody, within 500 feet of any diplomatic facility from either carrying a flag, placard, banner, or anything like that, or from gathering in a group of three or more people if a police officer in his sole discretion decides they should leave. What this means is that nobody can stand within 500 feet of any diplomatic facility if a police officer or the prosecutor or the State Department does not like it.

Five hundred feet in front of every diplomatic facility in Northwest Washington leaves the public very little place to congregate. If you take a radius of 500 feet around every diplomatic installation, that covers a huge percentage of the business area of the city. I will tell you, Mr. Chairman, there are places on Capitol Hill and property of the U.S. Capitol that are within 500 feet of diplomatic facilities. It might be interesting for Members of Congress to know that three of them could not gather together on Capitol property and not be in violation of this statute.

We hear about the 500-foot rule and the 100-foot rule. It is not that simple. The Federal statute contains no prohibition against carrying flags, banners, or anything like that. And within 100 feet, a demonstration is unlawful only if it is done with the "intent to intimidate, coerce, threaten, harrass, or obstruct a foreign official." I submit to this subcommittee that not a single one of the demonstrators in front of the Soviet Embassy that have been prosecuted and convicted and are now criminals could have even been arrested under the Federal law.

And the truth of the matter is that demonstrations similar to those in the District of Columbia have occurred in front of the Soviet consulate in San Francisco and in front of the Soviet mission in New York, and there have been no prosecutions at all, which is exactly what you would expect.

It is clear—and I think everyone agrees—that the D.C. statute is a statute that limits and infringes freedom of speech. The Supreme Court has said it is permissible to do that in cases where there is a legitimate reason to do so, but no matter how important the reason is, it must be done in a manner that is narrowly tailored so that the infringement is not one iota greater than what is necessary. I submit that the existence of the Federal statute is proof positive that the D.C. law is not narrowly tailored.

Why do we need two different statutes? Under the current regime, you have three possible scenarios. If I go and stand with a flag in front of the South African Embassy, I will be arrested but I will not be prosecuted. If I take the flag and stand in front of the Soviet Embassy I will be arrested and prosecuted and convicted. If I stand in front of any embassy, any mission, any consulate anyplace else in the United States, even across the river in Rosslyn, I will not be arrested or prosecuted. Embassies and missions throughout the United States deserve equal protection wherever they are. The Soviets are going to be just as affronted by an attack

on their mission in New York or their consulate in San Francisco than they would on their embassy here. Citizens of the United States deserve the same constitutional privileges wherever they are in the United States.

Senator GRASSLEY. I have to interrupt. We are in the middle of another vote. I am going to have to do what I have never done before, and apologize to Mr. Spitzer. You are going to have to give your testimony when I am not here because I cannot come back. I am sorry. I did not anticipate all these votes. What I would like to do for you, since I have never done this before in all the years I have been chairing committees in the Senate, is to give you private time with me in my office—you are here in the city, right?

Mr. SPITZER. Yes, sir.

Senator GRASSLEY. I would be glad to have you come to my office and I will give you more than equivalent time to say to me privately what you will say publicly for the record. So I would ask Mr. Waxman to finish his statement after I leave and then for you to go ahead as usual. The only question I have for the entire panel is to ask your comments on any of the previous panels' suggestions as some of you have already done. After that I was going to make a short closing statement and adjourn the meeting. I would ask you to do that if you would.

Mr. SPITZER. I would be glad to do that, Mr. Chairman, and I am delighted with your more than generous offer of private time, which I certainly will take you up on.

[Statement follows:]

CLOSING STATEMENT BY SENATOR CHARLES E. GRASSLEY

As a result of the testimony I have heard today—and failing a change in the prosecutorial policy at the Department of Justice—I believe I will be drafting legislation which will be in greater harmony with the notions on which our country was founded.

I see no compelling reason why a 500-foot law is necessary. It seems that the 100-foot rule found in the Federal Statute is entirely adequate and more consistent with our tradition of civil liberties. I will be working with my colleagues to that end.

I thank the witnesses very much and, in closing, would just say I only hope that someday these demonstrations will no longer be necessary because the governments in question will have changed their human rights policies.

But up until that time, it is incumbent upon us, as guardians of a free society to protect those who speak out against such policies.

Mr. WAXMAN. I just want to say in conclusion that the Federal statute was considered by Congress, and has always been considered by the administration in the 15 years it has been in effect, to be entirely satisfactory to achieve the laudable purpose of protecting foreign diplomatic facilities. If there is some reason why it is determined to be inadequate in the District of Columbia, there are several local statutes of general application, that independent of section 115, more than adequately protect the Soviet Embassy. I think section 1115 of the D.C. Code is totally unnecessary, anachronistic law that is tying up our police resources, the courts, and Congress, and is branding as criminals thousands of well-behaved, well-meaning citizens who are engaged in conduct that we should applaud.

I urge the subcommittee to propose to the Senate and the Congress that D.C. Code section 1115, the Nazi-era statute, be repealed,

and that U.S. Code section 112(b) be extended to the District of Columbia with the same force that it has everyplace else in the United States. Thank you.

[Statement follows:]

Prepared Statement of Seth P. Waxman

Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear and testify today concerning the prosecution of demonstrators outside the Soviet Embassy. It is a great honor to appear before this committee. I hope my testimony will be of assistance.

During the past year a recurrent ritual has played itself out again and again on the public sidewalk in front of the Soviet Embassy at One Sakharov Plaza (16th Street), N.W., in the District of Columbia. A group of citizens gathers on the sidewalk at a date and time arranged in advance with the Metropolitan Police Department. The citizens carry no signs or placards. They do not shout or chant. They do not harass, block, or interfere with people passing by or entering the embassy.

One or more of the group explain briefly that they have gathered near the embassy to protest Soviet persecution of religious minorities and to highlight individual cases of ongoing maltreatment. After four or five minutes the protesters are ordered by the police to disperse. When they do not, they are arrested and charged with violating the so-called "congregation clause" of 12 D.C. Code § 1115, which makes it unlawful "to congregate within 500 feet of any [foreign embassy or installation], and refuse to disperse after having been ordered to do so by the police."

Every one of these citizens -- and there have now been over 150 -- is prosecuted by the United Sates Attorney. Usually the defendants plead not guilty and are "tried" in a bizarre proceeding in which the prosecution's case is stipulated and the defendants are not allowed to present evidence in support of the defenses they wish to raise. The defendants are all convicted and sentenced to fifteen days in jail, suspended, with six

month's probation and a fifty-dollar fine. Those who refuse probation are sent to prison.

Meanwhile, a short distance up Massachusetts Avenue from the Soviet Embassy, a similar drama is regularly enacted in front of the South African Embassy. These demonstrators have a similar but related message: they are protesting the South African government's treatment of its black citizens. The demonstrators conduct themselves in much the same manner as do their Soviet Embassy counterparts (although they frequently chant, sing and carry placards). They are treated identically by the police. But at the direction of the United States Attorney, they are never prosecuted. Not a single one.

I am an attorney, a litigator, and I represent, pro bono, a number of the Soviet Embassy demonstrators. My clients -- a mother of five from Iowa; a university professor and a Soviet Jewry activist from California; a rabbi, a graduate student, and a nuclear physicist (once a Soviet refusenik) from Massachusetts; a social worker from Illinois; and a housewife and an advertising executive from Michigan -- differ widely in age, in background, in religious beliefs. They are wonderful people, highly regarded in their communities with blemishless records and a deep sense of the injustice of the Soviet treatment of religious minorities, particularly of the Jews it will not allow to practice their religion or to emigrate. On October 22, 1985, these nine came together for five minutes on the public sidewalk in front of the Soviet Embassy and were arrested. At great personal expense each returned to Washington, D.C., for trial. These people are now convicted criminals.

In my view these convictions are unconstitutional for at least three reasons:

First, because these citizens are the victims of a deliberate policy of selective prosecution which allows foreign governments -- indeed governments whose policies are most

abhorrent to ours -- to dictate the manner in which Congress' laws are applied to American citizens engaging in identical exercises of free speech;

Second, because in the defendants' trials the court has denied them the right to present any evidence in support of their common-law defenses; and

Finally, and most fundamentally, because the statute under which these citizens have been prosecuted and convicted is an overbroad and vague infringement of fundamental First Amendment rights.

I recognize, of course, that prosecutive policy is the prerogative of the executive and that questions of trial procedure and the availability of common-law defenses are matters, at least initially, for the judiciary. Therefore, and because I understand other witnesses will be addressing these issues, I will limit my written comments to what I consider to be the most fundamental injustice of these prosecutions -- and the one Congress can do most about. In my view the congregation clause of 22 D.C. Code § 1115 -- indeed all of § 1115 -- should be repealed. I would like to explain briefly why.

What I offer today is "A Tale of Two Statutes", for Congress has passed two separate and quite different statutes to achieve the same purpose: to protect foreign diplomats and diplomatic installations. The first, passed in 1937 and codified at 22 D.C. Code § 1115, applies only in the District of Columbia; the second, passed in 1972 and codified at 18 U.S.C. § 112, governs everywhere else. Both of these statutes contain "congregation clauses", but the two versions are very different. The earlier D.C. Code version -- under which the Soviet Embassy protesters have been prosecuted -- is far broader and far more constitutionally suspect. I do not believe it is necessary, and I do not believe that citizens and diplomatic

facilities should be treated differently in the District of Columbia than in the rest of the United States.

1. The D.C. Statute

At the time the District of Columbia statute was enacted in 1937, there was no federal law providing special protection for foreign embassies and officials. The Nazi regime in Germany spawned demonstrations at the German Embassy in Washington. To protect the German diplomats from a perceived threat (and, of course, to protect all other diplomats as well), Congress hastily passed what is now D.C. Code § 22-1115. It is more than a little ironic that the law enacted to shelter Nazi diplomats from the glare of public protest is now being used to insulate the Soviet Embassy from peaceful protests against repression of Jews and other religious minorities.

The 1937 statute -- a blunderbuss of a law -- contains two distinct provisions. The first, known as the "flag and banner" clause, makes it a crime "to display" within 500 feet of any diplomatic facility in Washington, D.C., "any flag, banner, placard, or device designed or adapted"

> to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute the political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives . . . , except by . . . permit issued by the Chief of Police . . . .

The second clause of § 22-1115 -- the so-called "congregation clause" -- is even broader than the flag and banner prohibition. The second clause makes it unlawful merely

> to congregate within 500 feet of any [diplomatic] premises, and refuse to disperse after having been ordered to do so by the police . . . .

It prohibits, in other words, at the unbridled discretion of the

police, any group of three or more people, however peaceful and quiet and regardless of their purpose, on any public street or sidewalk within 500 feet of any embassy or related building.

Both of these provisions are patently unconstitutional.

First, while protecting foreign diplomats and embassies is undeniably an important congressional purpose, any statute which seeks to achieve this end by prohibiting the peaceful expression of political speech is subject to strict scrutiny under the First Amendment, which requires that such limitations, where permitted at all, be "content-neutral" and "narrowly-tailored." See, e.g., Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984). The prohibition must be no broader in scope than is absolutely necessary to achieve the legislative end. See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent, 104 S. Ct. 2118, 2129 (1984). No one can seriously contend that a law prohibiting three people from standing together 499 feet from the property line of a diplomatic facility is "narrowly-tailored" to protect diplomats.

Second, the law was designed to serve a separate, impermissible purpose. As the Act's sponsor explained on the floor of the Senate, a principal aim of the law was to insulate foreign diplomats from exposure to public criticism of their nations' policies. See 81 Cong. Rec. 8587-92 (1937). Yet whatever the state of constitutional jurisprudence may have been in 1937, it is elementary today that the First Amendment denies Congress the power to pass laws to protect people or national institutions from "insult" or "annoyance" caused by the peaceful expression of critical views on subjects of public concern. See, e.g., Coates v. Cincinnati, 402 U.S. 611 (1971).

Third, the statute vests unbridled and unreviewable discretion in the police to determine what flags and which congregations to permit. The Supreme Court has consistently and

emphatically held that laws which leave the regulation of speech or assembly to the uncontrolled will of a government official cannot stand. See, e.g., Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).

Finally, the statute does not even rationally relate to its one legitimate aim. The statute does not prohibit assaults on diplomats, trespass on their property, or even harassment, threats or the like if not accompanied by a "flag, banner, or placard." Two people can shout epithets all day long in front of the Soviet Embassy, but one person cannot stand with a flag and three people cannot peacefully gather in a silent vigil 499 feet away. Section 1115 is not only grossly overbroad; it does not even protect against that conduct which would be within its "legitimate sweep." 1/ Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

2. The Federal Statute

The 1937 statute, moreover, is totally unnecessary. In 1972, Congress passed the Act for the Protection of Foreign Officials and Official Guests of the United States. Section 301 of that Act, codified (as subsequently amended) at 18 U.S.C. § 112(b), provides that a person is guilty of a crime if he willfully

> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;
>
> (2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or

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1/ Those protections are provided by local statutes of general application. See, e.g., D.C. Code § 22-1107 (unlawful assembly), § 22-1121 (disorderly conduct), § 22-3102 (unlawful entry on property). Under these provisions, if the police believe a breach of the peace is imminent, they can immediately set up a police line, order a congregation to disperse, and arrest those who disobey.

> (3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for any diplomatic, consular, or residential purposes by [a foreign government or official], congregates with two or more other persons with intent to violate any other provision of this section.

Subsection (d) of the statute specifically states:

> Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

Another provision, 18 U.S.C. § 970, makes it unlawful for any person willfully, with the intent to intimidate, coerce, threaten or harass, to "forcibly thrust any part of himself or any object" into any building used for diplomatic purposes, or to "refuse to depart from such . . . premises after a request."

This 1972 statute is a more constitutionally sensitive, yet more effective law. Whereas § 1115 prohibits any congregat[ion] of three or more people within 500 feet of any embassy or diplomatic facility following a police order to disperse, the federal law prohibits congregation only within 100 feet of the facility and -- more importantly -- only when accompanied by an intent to intimidate, coerce, threaten, harass, or obstruct a foreign official or official guest in the performance of his duties. Instead of banning peaceful protests with signs and placards hundreds of feet from embassy property, as the D.C. statute does, the 1972 law goes right to the heart of the matter and prohibits trespass on embassy property and intimidation, coercion, harassment, or obstruction of foreign officials. That is a reasonable and permissible way to address the important aims both statutes to serve.

Why then need we have separate statutes? The 1972 Act is considered by the United States Government to provide adequate protection to foreign diplomats and their property all across the United States, including New York City, the headquarters of the

United Nations and the residence of many foreign diplomats of ambassadorial rank. Congress did not extend the 1972 Act to the District of Columbia only because it was advised that "a District law of long standing affords similar protection to foreign officials in the Nation's Capital." S. Rep. No. 92-1105, reprinted in [1972] U.S. Code Cong. & Ad. News 4316, 4328. But as any comparison of the two statutes reveals, the "District law" goes far beyond providing "similar protection," and disregards the very constitutional protections that Congress was careful to include in the more recent nationwide legislation.

The State Department, as well as many of the Superior Court judges in the Soviet Embassy cases, have sought to justify prosecution under the congregation clause on the grounds that we must provide protection for foreign diplomats commensurate with the protection we expect for our diplomats abroad. After Iran and Lebanon, who can dispute the importance of such protection? This purpose, however, is fully served by the federal statute. It is not served by a law prohibiting peaceful demonstrations near embassies. Our own embassies abroad are not immune from such protests, nor should we wish them to be. 2/ We -- who laud the principle of free political speech -- should encourage the peaceful expression of disagreement with our government. Free political expression is a safeguard of our country, not a threat. It is the ultimate irony that in a totalitarian state

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2/ Even if foreign nations did extend such unnecessary and unwanted "protection" to our embassies, that would not justify the suppression of First Amendment freedoms within the United States. A treaty or international agreement that violates the Constitution is just as invalid as a statute that does so. The government cannot constitutionally enact a law that would permit picketing in front of the White House only if it applauds the incumbent administration. Nor could it agree, in a treaty with the Soviet Union, that both nations would only allow pro-government picketing in front of their respective embassies. The validity of a United States law must be judged under the standards of the United States Constitution, and if it fails to pass muster, it cannot be saved because it might be valid under the laws of another nation.

like the Soviet Union groups are permitted to demonstrate in front of our embassy with banners and placards (see Washington Post, Oct. 2, 1984, at A16), whereas here, where the constitutional guarantee of free speech was conceived and is cherished, three citizens cannot stand peacefully on a sidewalk in front of the Soviet Embassy without fear of arrest.

It is grossly offensive to constitutional values that an American citizen can be sent to prison simply for gathering with others -- peacefully, respectfully, and quietly -- on a public sidewalk within 500 feet of an embassy. And whoever would have thought that a citizen could be jailed simply for holding a sign saying "Free Soviet Jewry" or "Apartheid is Evil" within sight of the Soviet or South African embassies. Foreign diplomats do not need this protection, and our Constitution does not allow us to provide it. Congress recognized this when it enacted its 1972 legislation. It should now repeal the anachronistic, unconstitutional D.C. statute and extend to our Nation's Capital the fully adequate protections that apply everywhere else in our country. Had that been done a year ago, my clients and over 150 other model citizens would not now stand as convicted criminals simply for having acted in the finest American tradition.

Thank you.

Mr. SPITZER. I do not know whether I should say Mr. Chairman or Ms. Counsel, but I am in either event delighted to be here testifying and delighted to be on this panel with my friend, Mr. Kamenar, from the Washington Legal Foundation, which I am glad to see appreciates the value of the first amendment in this context for a change.

In addition to our general interest in the rights of demonstrators in the District of Columbia, I might mention that we have also been active on this particular issue. We represented, until the case was dismissed just recently, a group of 10 Ukrainian students who were arrested and prosecuted for demonstrating in front of the Russian Embassy here in Washington.

I had intended to mostly make my remarks in response to the question the Senator would have asked, which is in reaction to things other panelists have said, since my prepared statement is in the record. I thought we saw a very interesting display from the

government witnesses this afternoon, something of a dance around a circle because it appears that the Department of Justice and the Department of State feel strongly that there is a need for this law, but to every hard question about where the need really comes from, the response is either to say we are just following what Congress told us to do when they passed this law or else to say, well, the courts have upheld it. Why did the courts uphold it? If you look at all these court decisions, the courts all upheld it in deference to Congress because Congress has expertise and authority in the area of foreign relations and diplomacy and the courts should defer to Congress. So ultimately it all comes back, both the courts and the executive branch statements this afternoon, simply to saying we think it is important because Congress passed it. In answer to all the questions about what is the real, underlying need for this law, there really is no answer.

Now, as for what Congress has communicated to the rest of the government, Congress did pass the statute nearly 50 years ago in response to demonstrations against the Embassy of Nazi Germany here in Washington, DC. Congress then in 1972 passed a carefully tailored statute that Mr. Waxman has referred to that applies to the rest of the United States. That statute certainly satisfies our international obligations under treaties and conventions of all kinds. If it did not, it would need to be amended for the rest of the country.

The only reason, as far as I can tell from my research, that Congress did not make that statute apply to the District of Columbia and repeal D.C. Code 22–1115 in 1972 is because they were misled. The legislative history reflects that Congress was informed at that time that they did not need to make this statute apply here because there was an existing statute in the District of Columbia that provided similar protection. The exact quote is in my prepared testimony.

Obviously, that was not quite an accurate representation to Congress because the protection, as we have seen in the testimony here today, is not similar at all. To the extent that Congress has focused on and thought about the issue of the protection that is needed for foreign embassies and diplomats in the United States, they did so more recently and more carefully and more thoroughly in 1972 than they did in 1938 and all that Congress needs to do—I am in accord with my friend, Mr. Waxman—is make that statute apply throughout the country.

Now, there has been some talk this afternoon about the substance of the need for this statute, but I think when it is examined, it turns out to be pretty hollow. There was a mention of the need for a 500-foot buffer zone around embassies. As others have pointed out, neither Congress nor the executive branch appears to believe that there is a need for a 500-foot buffer zone around the United Nations, around consulates and missions in San Francisco, in New York, in Chicago, elsewhere around the country. The U.S. attorney, Mr. diGenova, said, well, maybe the District of Columbia is different because it is small, because it has a lot of embassies compacted into a relatively limited area. But the security forces in the District of Columbia feel no need for a 500-foot buffer zone with respect to

other places that are equally important to protect against the possibility of a demonstration turning violent.

There is no 500-foot zone where demonstrating is not allowed around the White House or around Capitol Hill or around the Supreme Court or around the State Department. Indeed, there have been court cases saying that such a thing would be unconstitutional. In 1983 the Supreme Court struck down a statute prohibiting demonstrations on its own sidewalk. In 1972 the Supreme Court struck down a statute prohibiting demonstrations on Capitol Hill as unconstitutional.

The Federal courts in 1974 and 1975 struck down a Nixon administration regulation severely limiting demonstrating in Lafayette Park and the sidewalk in front of the White House and ruled that demonstrations of at least 3,000 people had to be allowed in Lafayette Park, which is less than 500 feet from the front door of the White House. Such demonstrations have been held repeatedly over the years since then without any problem at all. Here in this city one way in which it is distinguished from other cities around the country, is that we probably have more law enforcement officers per capita than anywhere else in the country and maybe the world. I have high confidence, apparently higher than that of the U.S. attorney and the State Department, in the abilities of the Metropolitan Police Department, the Park Police, the Secret Service Uniformed Division, the Executive Protective Service, and other security forces here to protect Government buildings and foreign embassies against unruly demonstrators. They have had no trouble doing it in the past and they will not in the future, and I might note that one kind of regulation that is not unconstitutional is the requirement that there be some reasonable advance notification to the authorities if a large demonstration is going to take place in a sensitive area so that sufficient police personnel can be on hand to take care of any contingency.

There is one other, I think, very curious thing about this assertion that there is a need for a 500-foot buffer zone against demonstrators, and even under the terms of this statute against a group as small as three, and that is the assumption, which I think is a truly insulting assumption, that demonstrators are somehow more dangerous and more of a problem from a security point of view than other people. There is nothing in this law or any other law that makes it a crime for 3 people or 5 people or 50 people to walk down the sidewalk together in front of the Russian Embassy or the South African Embassy or any other embassy. But for the same number of demonstrators to walk down that same sidewalk is unlawful. I do not know anything in logic or in law—and indeed it seems to me it would be quite an unconstitutional assumption for a Government agency to make—that a demonstrator is more likely to be carrying a bomb in his pocket or a brick in his pocket or to intend harm to the occupants of the Embassy than someone else.

John Hinkley did not go to the Hilton Hotel with a big sign saying "Down With Reagan." He just went there quietly in a suit with a gun in his pocket. Anyone who wanted to really do harm to an ambassador would probably not advertise it by being a demonstrator. So the whole concept that we need to protect the security of embassies and diplomats against peaceful demonstrators and not

have that same concern about people I think is a very offensive assumption.

Demonstrators are people and demonstrators are not more dangerous.

Finally, the statute was justified with respect to our reciprocal obligations or reciprocal desires with respect to foreign countries. As I have noted, surely the Federal statute satisfies those obligations as a legal matter, but the Government representative spoke about how they were not talking about literal reciprocity, they said, but that they wanted sympathetic treatment of our Embassies abroad comparable to what we gave other countries' Embassies here.

There again I think that is a very disturbing statement because I do not think that the United States has any right to want countries abroad to prohibit peaceful demonstrations critical of the United States in front of American Embassies abroad. If anything, we want to be a beacon of light and liberty and teaching to the rest of the world, that in the United States dissent against Government policy is the ordinary, day to day breadth of our society.

Of course, we want our Embassies abroad protected against violence, against danger, against exactly the things that are listed in the general Federal statute against intimidation, coercion, threats, or harrassment. We do not need this 500-foot statute to prevent that. If the executive branch is telling the Congress here today that they are enforcing this statute because they want foreign countries to protect American Embassies abroad from peaceful, critical demonstrations, I think Congress should send a very clear message to the executive branch that that is not the kind of reciprocity we want at all. For all those reasons I think the statute ought to be repealed as promptly as possible.

[Statement follows:]

Prepared Statement of Arthur B. Spitzer

Mr. Chairman and Members of the Subcommittee, my name is Arthur B. Spitzer and I am the Legal Director of the American Civil Liberties Union of the National Capital Area, on behalf of which I am testifying today. The ACLU of the National Capital Area is the Washington, D.C. area affiliate of the American Civil Liberties Union.

We appreciate the opportunity to present our views on Section 22-1115 of the District of Columbia Code. Our view can be summed up in a word: it is unconstitutional.

Section 1115 is a criminal statute adopted by Congress in 1938. It prohibits, upon pain of fine and imprisonment, the display of any "flag, banner, placard, or device" within 500 feet of any embassy or other building used by foreign diplomats for their official purposes, but only if the display is "designed or adapted" to bring the foreign government or its officials "into public odium" or "into public disrepute."*/

Thus the statute would permit a person to stand in front of the French Embassy with a sign reading "Vive Mitterand" but would make the same person a criminal if his sign read

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*/ As written, the statute makes it unlawful to perform these acts within 500 feet of any such building regardless of which government is the object of the criticism. We understand, however, that the statute is only enforced to prohibit such demonstrations within 500 feet of the buildings occupied by diplomats of the nation being criticized. This sometimes results in the anomolous situation of, for example, demonstrators protesting the British policy in Northern Ireland picketing in front of the Brazilian Embassy, 500 feet down the road from the British Embassy.

The statute also prohibits, within the same areas, the display of flags, banners, placards or devices that are designed or adapted to "intimidate, coerce, [or] harass" foreign diplomats, or to interfere with their "free and safe pursuit of the[ir] duties." If these terms are properly interpreted and applied, we would not object to the enforcement of these provisions. However, as pointed out below, we believe that the legitimate purposes underlying these provisions are fully served by other federal statutes, already on the books, that apply to foreign diplomatic personnel in all 50 States, and by other sections of the District of Columbia Code.

"Mitterand Should Resign." Or a demonstrator could picket in front of the South African Embassy with a sign commending that government on its race relations policy, but a demonstrator whose sign criticized the Apartheid policy is required to picket nearly two football fields away -- completely out of sight of the embassy and its personnel. Indeed, a person is allowed to hold up a sign within 500 feet of the embassy expressing his or her views on any other subject -- the need for a new D.C. Jail, or for a new Fire Chief, or for a Redskins victory -- anything except a criticism of a foreign country or its officials.

What the statute does, then, is to discriminate among speakers based on the content of their speech. Such "content discrimination" is the clearest form of unconstitutionality under the First Amendment. It has been repeatedly and unambiguously condemned by the Supreme Court.

In Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972), the Supreme Court made this explicit, stating:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . .
>
> Necessarily, then, . . . government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.

We are not aware of any Supreme Court decision that has ever upheld a law that permitted only one side of an issue to be discussed in a public forum such as a city street or a park. The impermissibility of such content distinction is universally regarded as a basic proposition of First Amendment law. If a law student asked her professor for a simple example of a law that would clearly violate the First Amendment, the example likely to be given would be a law just like D.C. Code § 22-1115.

To be sure, there is a valid and very important Congressional purpose underlying Section 1115: protecting the

security of the property and the safety of the diplomatic representatives of foreign nations. Our recent experiences in Iran and elsewhere certainly highlight the importance of such protection. But this purpose is fully served by the provisions of a more recent and more comprehensive Congressional statute, as well as by the generally applicable provisions of District of Columbia law.

In 1972, Congress passed the Act for the Protection of Foreign Officials and Official Guests of the United States (Pub. L. 92-539, 86 Stat. 1070). Section 301 of that Act, codified (as subsequently amended) at 18 U.S.C. § 112(b), provides that a person is guilty of a crime if he willfully

> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;
>
> (2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or
>
> (3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for any diplomatic, consular, or residential purposes by [a foreign government or official], congregates with two or more other persons with intent to violate any other provision of this section.

Section 401 of the Act, codified (as subsequently amended) at 18 U.S.C. § 970, similarly makes it a federal crime for a person willfully, with the intent to intimidate, coerce, threaten or harass, to "forcibly thrust any part of himself or any object" into any building used for diplomatic purposes, or to "refuse to depart from such . . . premises after a request." Thus, existing Congressional legislation provides comprehensive protection for both diplomatic property and diplomatic personnel.

Notably, Congress took care in the 1972 Act to indicate on the face of the statute its concern that the rights of United States citizens peacefully to express their views

should not be infringed by any overbroad interpretation of the statutory language:

> (d) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

The 1972 Act is considered by the United States Government to provide adequate protection to foreign diplomats and their property all across the United States, including in New York City, the headquarters of the United Nations and the residence of many foreign diplomats of ambassadorial rank. Congress did not extend this Act to the District of Columbia only because it was informed that "a District law of long standing affords similar protection to foreign officials in the Nation's Capital." S. Rep. No. 92-1105, reprinted in 1972 U.S. Code Congressional and Administrative News 4316, 4328. But, as shown above, the "District law" referred to in fact goes far beyond providing "similar protection," and disregards the very constitutional protections that Congress was careful to include in the more recent nationwide legislation.

Generally applicable District of Columbia laws also provide any necessary protection for diplomatic property and personnel. See, e.g., D.C. Code §§ 22-1107 (unlawful assembly); 22-1121 (disorderly conduct); 22-3102 (unlawful entry on property).

Unfortunately, the legitimate governmental interest of protecting the persons and property of foreign nations from harm is not the only interest served by Section 22-1115. The actual purposes of that statute -- as explained on the floor of the Senate by its sponsor, Senator Pittman -- include the protection of foreign diplomats from having to see or hear any public criticism of their nations' policies. See 81 Cong. Rec. 8587-8592 (1937), cited in Zaimi v. United States, 476 F.2d 511, 520-21 (D.C. Cir. 1973). But this is simply not a legitimate purpose for a law passed in this country, under our

Constitution. Similar statutes (even though content-neutral) attempting to prohibit all demonstrations on the grounds of the Capitol or of the Supreme Court, have been struck down by the Supreme Court. See Jeanette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C.), aff'd mem., 409 U.S. 972 (1972); United States v. Grace, 103 S. Ct. 1702 (1983).

Section 22-1115 has been twice upheld by the lower federal courts. See Frend v. United States, 100 F.2d 691, 69 U.S. App. D.C. 280 (D.C. Cir. 1938), cert. denied, 306 U.S. 640 (1939); Jewish Defense League v. Washington, 347 F. Supp. 1300 (D.D.C. 1972).*/ We believe these cases were wrong when they were decided, and that they are even more clearly wrong in light of current Supreme Court law. Both of these decisions rest primarily on the importance of the need to protect foreign diplomats from harm, but, as shown above, the statute goes far beyond what is necessary or reasonable to protect that interest.

These decisions also rested on the statute's policy of protecting foreign diplomats against any "offensive demonstration," "insult," or "annoyance." Frend v. United States, supra, 100 F.2d at 693. But whatever the law may have been in 1938, it is elementary today that the First Amendment

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*/ Section 22-1115 was also at issue in two other cases. Zaimi v. United States, 476 F.2d 511, 155 U.S. App. D.C. 66 (D.C. Cir. 1973), involved an Iranian who shouted at the Shah of Iran from across the street. The D.C. Circuit held that the statute did not prohibit oral speech, and therefore did not reach Zaimi's constitutional challenge to the law. However, the court's discomfort with the statute is apparent between the lines. In Jews for Urban Justice v. Wilson, 311 F. Supp. 1158 (D.D.C. 1970), the court was unwilling to consider the constitutionality of the statute on the merits in passing on an application for a temporary restraining order against its enforcement.

Several cases challenging the constitutionality of § 22-1115 are now pending in the federal and local courts in the District of Columbia.

denies Congress the power to pass laws to protect people against "insult" or "annoyance" that is caused simply by the peaceful expression of critical views about subjects of public concern.

The two decisions upholding the statute also reflect a concern that the United States must, under international law, provide protection for foreign diplomats commensurate with that provided to our diplomats abroad. This is certainly a legitimate concern. But the fact is that there is no principle of international law prohibiting peaceful demonstrations near embassies, and U.S. embassies abroad are not immune from and do not require protection against peaceful demonstrations.

Furthermore, even if foreign nations did extend such unnecessary and unwanted "protection" to U.S. embassies, that can provide no legal basis for the suppression of First Amendment freedoms within the United States. A treaty or international agreement that violates the Constitution is just as invalid as a statute that does so. The government cannot constitutionally enact a law that would permit picketing in front of the White House only if it applauds the incumbent administration. Nor could the government accomplish that same objective by agreeing, in a treaty with the Soviet Union, that both nations would only allow pro-government picketing in front of their respective Executive Mansions. The validity of a U.S. law must be judged under the standards of the United States Constitution, and if it fails to pass that muster, it cannot be saved because it might be valid under the laws of other nations.

The commendable sensitivity to constitutional rights that Congress displayed in its careful legislation on this subject in 1972 should be extended to the District of Columbia. It appears that this was not done at that time only because Congress believed that the existing local statute was

"similar" to the law it was about to enact. Unfortunately, the facts are otherwise: Section 22-1115 is not narrowly tailored to protect the safety of diplomats, but sweeps broadly to censor speech that diplomats might be "annoyed" to hear.

In our view, it is grossly offensive to constitutional values that a U.S. citizen can be sent to prison simply because he or she stands peacefully on a public street holding up a sign saying "Russia out of Afghanistan" or "Solidarity" or "Apartheid is Evil." There is no reason to believe that professional diplomats need to be protected against seeing such signs. There is certainly no reason to believe that they need such protection more in the District of Columbia than they do in New York or Chicago or Los Angeles. And there is emphatically no reason why the residents of the District deserve less protection of their constitutional rights under the First Amendment than residents of the other 50 States and the several Territories. D.C. Code § 22-1115 ought to be repealed, and replaced with the fully adequate protections found in the federal criminal law, 18 U.S.C. §§ 112 and 970.

. . . . .

In addition to the facial unconstitutionality of Section 22-1115, the recent pattern of enforcement and non-enforcement of this law must be most distressing to anyone concerned with civil liberties. During the past year and a half, the citizens of the District -- and of the Nation and the world -- have been treated to the disturbing spectacle of what appears on its face to be politically a motivated decision to prosecute or refrain from prosecuting violations of the 500-foot law.

The principle involved is clear and simple. The decision whether or not to bring criminal charges against a person may not be based upon constitutionally illegitimate considerations, such as the color of his or her skin, the nature of his or her religion, or -- most relevant here -- the content of his or

her expression. As the Supreme Court explained just last year:

> [A]lthough prosecutorial discretion is broad, it is not "unfettered." Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.' United States v. Batchelder, 442 U.S. 114, 125 (1979) (footnote omitted). In particular, the decision to prosecute may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,"' Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), quoting Oyler v. Boles, 368 U.S. 448, 456 (1962), including the exercise of protected statutory and constitutional rights, see United States v. Goodwin, 457 U.S. 368, 372 (1982).

Wayte v. United States, 105 S. Ct. 1524, 1531 (1985).

Since November, 1984, literally thousands of people have been arrested for demonstrating in front of the embassy of the Republic of South Africa. Not a single one has been prosecuted. But when a few individuals demonstrate -- equally peacefully -- in front of the embassies of the U.S.S.R. or other nations, charges under D.C. Code § 22-1115 are pressed in court. The only apparent explanation is that demonstrating against apartheid is viewed with considerable favor in this jurisdiction, while demonstrating against other nations is not so strongly approved. This is certainly the conclusion that a great many people have reached, observing the situation. It is a conclusion that substantially damages our legal system's valued reputation for providing "equal justice under law."

It may be that there is some explanation for this difference in treatment that does not involve constitutionally illegitimate selective prosecution based on political approval or disapproval of the content of a demonstrator's speech. But if there is such an innocent explaination, it has not been convincingly presented by those who ought to be in a position to present it. Wherever the technical burden of proof may lie in raising a defense of selective prosecution in a criminal case, in this Congressional forum, and in the forum of public opinion, the burden of explaining this seemingly improper

governmental conduct must lie with those who have sole access to the facts -- the governmental officials involved.

We therefore commend this Subcommittee for its efforts to get at the truth of this situation, and we urge it to continue those efforts. If there is a legitimate explanation for the prosecutorial choices that have been made, there is no legitimate reason for it to be kept a secret.

. . . . .

In concluding, however, we wish to stress to the Subcommittee that even the most even-handed enforcement of this statute is still the enforcement of a blatantly unconstitutional law. For the reasons we have presented, the Subcommittee ought to recommend its complete repeal.

Thank you very much, Mr. Chairman.

Mr. WAXMAN. Just picking up on one thing that Mr. Spitzer said, a very good point, which is that the law does not prohibit anybody other than demonstrators from being within 500 feet. It does not even prohibit demonstrators from being within 500 feet. There is no crime against congregating within 500 feet until you refuse to disperse after being asked by the police. That is why the Cambodians in the *Strinko* case were not prosecuted. Any demonstrator, who wanted to attack the embassy would not stand there for half an hour waiting for the District of Columbia Police to discover that they were there, ask them to leave, and then refuse to leave. So I think Mr. Spitzer makes a good point. I think the law is even less suited toward the purpose that Mr. diGenova expressed than we had previously realized.

Ms. MILDER. Anything to add?

[No response.]

[Whereupon, at 5:16 p.m. the subcommittee was adjourned subject to the call of the Chair.]